

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

**PAWEL KOSICKI AND MEGAN MUNRO**

Appellants

- and -

**CITY OF TORONTO, FORMERLY THE CORPORATION OF THE BOROUGH OF  
YORK**

Respondent

- and -

**ADVOCATES FOR THE RULE OF LAW, ATTORNEY GENERAL OF ONTARIO,  
ATTORNEY GENERAL OF BRITISH COLUMBIA, CITY OF OTTAWA, CITY OF  
SURREY**

Interveners

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**FACTUM OF THE INTERVENER,  
ADVOCATES FOR THE RULE OF LAW**

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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## **PART I — OVERVIEW**

1. Statutory interpretation is a search for legislative intent. This search involves an inquiry into the statute’s text, context, and purpose. In this inquiry, text plays a primary role. After all, the express words chosen by the legislature are often the best window into legislative intent.
2. But, as this case demonstrates, disputes often arise over whether a legislature, in passing legislation, intended to preserve or preempt the common law. In these circumstances, Canadian courts have not always applied the applicable legal principles consistently, in a way that delivers consistent, predictable results. This creates a problem for the rule of law.
3. To address this problem, Advocates for the Rule of Law (“**ARL**”) proposes a method for analyzing whether a statute leaves gaps for the common law to fill. This method canvasses four textual indicia of legislative intent: (1) any express indications of an intent to leave or close gaps for the common law to fill; (2) the use of broad or narrow terms; (3) the structure of the legislative scheme; and (4) the temporal relationship between the statute and the common law.

## **PART II — QUESTION IN ISSUE**

4. ARL intervenes to propose a method for analyzing whether a statute leaves gaps for the common law to fill. ARL takes no position on the disposition of the appeal or the proper interpretation of the statute before the Court: the *Real Property Limitations Act* (the “**RPLA**”).

## **PART III — ARGUMENT**

### **A. PARLIAMENTARY SOVEREIGNTY CONSTRAINS THE COMMON LAW**

5. Parliamentary sovereignty is foundational to Canada’s constitutional order.<sup>1</sup> Canadian legislatures are supreme over the courts and judge-made common law, subject only to constitutional limits.<sup>2</sup> Those limits include the jurisdictional limits established by the *Constitution*

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<sup>1</sup> *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, at para. [58](#) [*Reference re Securities Regulation*].

<sup>2</sup> *Reference re Securities Regulation*, *supra* note 1, at paras. [56-57](#).

*Act, 1867* and the substantive limits imposed by the *Canadian Charter of Rights and Freedoms*.<sup>3</sup>

6. Within these limits, a legislature can make or unmake any law it wishes.<sup>4</sup> Nothing but the Constitution can stop a legislature from preserving or preempting the common law as it sees fit. Courts may review a statute that affects the common law for its constitutionality, but not for its wisdom. A challenge to the wisdom of a statute must be addressed to the legislature, not to the courts.<sup>5</sup> In this way, legislation is paramount over common law in Canada's constitutional order. Legislation may abrogate or constrain the reach of the common law, not the other way around.

## **B. STATUTORY INTERPRETATION INVOLVES A SEARCH FOR LEGISLATIVE INTENT**

7. Within this constitutional framework, a court's role in interpreting legislation that may affect the common law is to discern legislative intent.<sup>6</sup> A court must adopt an interpretive approach that detects and respects the legislature's intent, whether that intent is to displace the common law or to leave gaps for the common law to fill.

8. When determining whether a statute leaves gaps for the common law to fill, the court should analyze the statute's text, context, and purpose, as the court would with any ordinary statute.<sup>7</sup> In doing so, the court should "firmly anchor" its analysis in the legislative text and give meaning to the text in light of its entire context.<sup>8</sup> Purpose and context cannot overwhelm text, and purpose and context are often best revealed through text.<sup>9</sup> Consistent with these principles, courts should treat *Hansard* evidence—an extrinsic aid—with caution.<sup>10</sup>

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<sup>3</sup> *Reference re Securities Regulation*, *supra* note 1, at paras. [56-57](#).

<sup>4</sup> *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, at para. [36](#), per Karakatsanis J.

<sup>5</sup> *R. v. Malmo-Levine*, 2003 SCC 74, at para. [5](#); *Canada (Attorney General) v. Power*, 2024 SCC 26, at para. [227](#), per Kasirer and Jamal JJ.

<sup>6</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. [118](#).

<sup>7</sup> *R. v. Basque*, 2023 SCC 18, at para. [63](#) [*Basque*].

<sup>8</sup> *La Presse inc. v. Quebec*, 2023 SCC 22, at para. [23](#).

<sup>9</sup> *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, at para. [75](#) [*TELUS*]; *R. v. Ndhlovu*, 2022 SCC 38, at para. [64](#); Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022), [59 Alta. L. Rev. 919](#) [*Mancini*].

<sup>10</sup> *MediaQMI inc. v. Kamel*, 2021 SCC 23, at para. [37](#); *R. v. Khill*, 2021 SCC 37, at para. [111](#).

### C. COURTS SHOULD CONSIDER FOUR TEXTUAL INDICIA OF INTENT

9. In discerning legislative intent, courts should pay special attention to four textual indicia of legislative intent: (1) any express indications of an intent to leave or close gaps for the common law to fill; (2) the use of broad or narrow terms; (3) the structure of the legislative scheme; and (4) the temporal relationship between the statute and the common law. These textual indicia should guide the court’s search for legislative intent when a common law rule or principle is in play.

#### (1) Express indications of legislative intent

10. The first—and strongest—indicium of legislative intent is any express indication in the text itself. If a statute expressly states that it supersedes the common law or instead does not affect the common law, the courts must generally give effect to this express intent.<sup>11</sup>

11. This first indicium—express indications of legislative intent—is first for a reason. Fidelity to statutory text is a fundamental precept of statutory interpretation. The statutory text often provides the best indication of legislative intent, and should play a primary, albeit not exclusive, role in the interpretive exercise.<sup>12</sup> The text is the medium “through which the legislature seeks to achieve [its] objective”; it reflects the final compromise that Parliament made between its intended objective and other considerations and should always be given primacy in statutory interpretation.<sup>13</sup>

12. To illustrate an express indication of legislative intent, s. 2 of the Ontario *Occupiers’ Liability Act* expressly supersedes occupiers’ common law duty of care: “this Act applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier’s liability in law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons”.<sup>14</sup> By contrast, s. 6(3) of the same statute expressly preserves certain aspects of the common law by stating that “[n]othing in this section affects any duty of the occupier that is non-

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<sup>11</sup> *Basque*, *supra* note 7, at para. 40.

<sup>12</sup> *TELUS*, *supra* note 9, at para. 47.

<sup>13</sup> *R. v. Archambault*, 2024 SCC 35, at para. 66, per Côté and Rowe JJ., citing Mancini, at pp. 920-22.

<sup>14</sup> Emphasis added.

delegable at common law”.<sup>15</sup> In these ways, the Ontario legislature has expressly defined how the statute does—and does not—affect the common law.<sup>16</sup>

13. An express indication of legislative intent in respect of one provision may also shed light on legislative intent in respect of another provision in the same statute. For example, if one provision expressly states that it supersedes the common law while another provision remains silent on the matter, this could support an inference that the latter provision—unlike the former provision—was not intended to supersede the common law. This approach reflects the principle that the different provisions of a statute must be read together as a whole.<sup>17</sup>

14. If a statute expressly displaces a common law rule, that will typically end the analysis. Conversely, if a statute is ostensibly silent on whether a common law rule continues, it will typically be necessary to proceed to the remaining three indicia—but there may be cases where the absence of express language itself is the definitive signal that the common law rule shall continue.

15. While courts have historically referred to “clear” or “clear and unequivocal” language as being necessary to displace a common law rule,<sup>18</sup> this rule has not always been followed, and courts have stated that common law rules can be ousted by necessary implication—indeed, common law rules have been ousted by implication in numerous cases.<sup>19</sup> There does appear to be a general consensus, however, that “clear and unequivocal” language is still required to displace deeply ingrained rules, meaning rules that have quasi-constitutional status or that are ubiquitous and anchor other subordinate rules. As examples, these would include rules concerning solicitor-client privilege,<sup>20</sup> litigation privilege,<sup>21</sup> Crown immunity,<sup>22</sup> a subjective *mens*

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<sup>15</sup> Emphasis added.

<sup>16</sup> *Occupiers’ Liability Act*, R.S.O. 1990, c. O.2, ss. [2](#), [6\(3\)](#).

<sup>17</sup> *R. v. Kirkpatrick*, 2022 SCC 33, at para. [46](#).

<sup>18</sup> *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 [*Lizotte*], at para. [56](#); *Canada (Attorney General) v. Thouin*, 2017 SCC 46 [*Thouin*], at para. [19](#).

<sup>19</sup> *Basque*, *supra* note 7, at para. [40](#). See, e.g.: *Giffen (Re)*, [1998] 1 S.C.R. 91, at para. [26](#); *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831, at para. [9](#); and *British Columbia Ferry Corp. v. M.N.R.*, 2001 FCA 146, at para. [43](#).

<sup>20</sup> *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, at para. [2](#).

<sup>21</sup> *Lizotte*, *supra* note 18, at para. [57-60](#).

<sup>22</sup> *Thouin*, *supra* note 18, at para. [17](#).

*rea* requirement,<sup>23</sup> vested private rights of action,<sup>24</sup> or just compensation for the taking of property.<sup>25</sup> Unfortunately, the jurisprudence has not provided a framework for determining when express language is absolutely required to displace the common law rule.<sup>26</sup>

16. In the present case, the common law rule at issue is not deeply-ingrained; rather, it is discrete and does not engage any quasi-constitutional principles. Moreover, there is no express indication in the RPLA one way or the other. As such, this indicium is not especially relevant in assessing the RPLA, and the Court should therefore proceed to the next three indicia. It should be left to future cases to decide whether, in the case of a more deeply-ingrained rule, the absence of express language displacing the common law rule could be determinative.

## (2) Use of broad or narrow terms

17. The second indicator of legislative intent, which also focuses on text, is the use of broad or narrow terms. Broad, open-ended terms generally reflect a legislative intent to leave room for the judiciary or an administrative decision maker (as the case may be) to fill in the gaps, including by recourse to the common law. By contrast, narrow, closed-ended terms generally reflect a legislative intent to leave no such room. Again, courts must generally give effect to the express words chosen by the legislature.

18. To illustrate, s. 1 of Ontario’s *Negligence Act* provides that, “[w]here damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent ...”. This broad, open-ended language leaves courts significant room to continue to develop the common law of “fault” and

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<sup>23</sup> *R. v. A.D.H.*, 2013 SCC 28, at para. [29](#).

<sup>24</sup> *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, at para. [32](#).

<sup>25</sup> *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36, at para [21](#).

<sup>26</sup> While it is not necessary to exhaust the list of deeply ingrained common law rules that may require “clear and unequivocal” language to be displaced, these would be exceptional. Given the supremacy of legislation over the common law, and the prime role of text in interpreting legislation, the search for “clear” language to discern the legislature’s intent is often unhelpful. Principles of statutory interpretation, and the four indicia identified by ARL (particularly the first indicium), are sufficient to discern the relationship between statutes and the common law in the vast majority of cases.

“negligence” within the general framework established under the *Negligence Act*.<sup>27</sup>

19. By contrast, narrow, close-ended language does not leave the same room for judicial gap-filling. While broad and open-ended language deliberately creates gaps, narrow and close-ended language may impliedly exclude gaps. And when a legislature chooses to frame a list in close-ended language, it may impliedly exclude the possibility of making additions to the list, such that “it may be assumed that the list is exhaustive.”<sup>28</sup>

20. In Canadian law, this interpretive rule is called “implied exclusion”: “legislative exclusion can be implied when an express reference is expected but absent”.<sup>29</sup> If the legislature contemplated an excluded item and nevertheless excluded it, that is strong evidence that the item was *intentionally* excluded.<sup>30</sup> And similarly, by framing a list in close-ended language the legislature can be said to have contemplated the possibility of unforeseen items—known unknowns—and made a deliberate choice not to open the list to such known unknowns.

21. Of course, the purpose and context of the statute will inform this inquiry, because whether an express reference could be “expected”—and what precisely the legislature contemplated by framing a list in close-ended terms—are questions informed by the purpose and context of the statute.<sup>31</sup>

22. If a legislature did intend to exclude the possibility of making additions to a close-ended list, such a choice must be respected. Antonin Scalia and Bryan A. Garner explained in *Reading Law: The Interpretation of Legal Texts*, “[w]hatever temptations the statesmanship of policymaking might wisely suggest, construction must eschew interpolation and eviscerations.

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<sup>27</sup> *Negligence Act*, R.S.O. 1990, c. N.1, s. [1](#).

<sup>28</sup> *Cophorne Holdings Ltd. v. Canada*, 2011 SCC 63, at para. [108](#).

<sup>29</sup> *University Health Network v. Ontario (Minister of Finance)* (2001), 151 O.A.C. 286 (C.A.), at para. [31](#) [emphasis added]. **See also:** *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51, at paras. [58-59](#).

<sup>30</sup> *Basque*, *supra* note 7, at para. [49](#); *Surdivall v. Ontario (Disability Support Program)*, 2014 ONCA 240, at para. [59](#), leave to appeal to ref'd 2014 CanLII 56699 (S.C.C.).

<sup>31</sup> *Green v. Law Society of Manitoba*, 2017 SCC 20, at para. [37](#).

[The judge] must not read in by way of creation.”<sup>32</sup>

23. Section 16 of the RPLA, for example, states that the statute does not apply to “any waste or vacant land of the Crown ... nor to lands included in any road allowance ... or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body”. Although ARL takes no position on the proper interpretation of the RPLA, the Court should consider the presence or absence of broad terms—and the presence of a closed list in the RPLA—when determining whether the legislature intended to leave room for the common law to fill any perceived gaps in the statute.

### (3) Structure of the legislative scheme

24. The third indicator of legislative intent—which also focuses on text—is the structure of the legislative scheme. Although courts sometimes ask whether the statute in question forms a “complete code”,<sup>33</sup> the clearer approach in this context is to ask whether adopting a common law rule would comport with the structure of the legislative scheme, or instead interfere with it. This focuses the analysis on legislative intent reflected in text.

25. To illustrate, the structure of the *Negligence Act* does not deal with the specific subjects of “duty of care” or “remoteness”. Instead, it leaves these concepts to the judiciary to develop in accordance with common law principles. Accordingly, supplementing the *Negligence Act* with these common law principles comports with its structure. Indeed, these common law principles are *necessary* to make the statutory scheme work.

26. By contrast, the structure of the *Occupiers’ Liability Act* deals with the specific subject of the statute’s application to the Crown. Section 10(1) states that the statute binds the Crown, but s. 10(2) states that the statute does not apply to the Crown in its capacity as an occupier of public highways. Developing a new common-law rule to determine the application of occupiers’ liability principles to the Crown would interfere with this legislative scheme and therefore conflict with legislative intent as reflected in the text. It would also undermine the legislature’s institutional

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<sup>32</sup> Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), at p. 93, quoting Justice Felix Frankfurter, “Some Reflections on the Reading of Statutes” (1947), 47 *Colum. L. Rev.* 527, at p. 533.

<sup>33</sup> *Kosicki v. Toronto (City)*, 2023 ONCA 450, at paras. [60](#), [64](#), [69](#) [*Kosicki*].

design choice<sup>34</sup> to make the application of occupiers' liability to the Crown a matter for legislative rather than judicial determination.

27. Although ARL takes no position on the outcome of the appeal, the Court should consider that the structure of the RPLA deals with exceptions to a statutory adverse possession scheme. Recognizing additional exceptions sourced from common law may frustrate the Ontario legislature's intended design of that scheme.<sup>35</sup>

#### **(4) Temporal relationship**

28. The fourth indicator of legislative intent—which focuses on the context for interpreting the text—is the temporal relationship between the statute and the common law. This relationship matters because it may shed light on legislative intent.

29. As mentioned above, certain authorities recognize, in some circumstances, a “presumption” that a legislature does not intend to abrogate common law rights or principles absent express statutory language or necessary implication.<sup>36</sup> But this presumption cannot logically apply where the common law right or principle developed only *after* the statute's enactment.

30. Statutes are generally to be interpreted as they would have been at the date of enactment, with limited exceptions.<sup>37</sup> Thus, in determining a statute's effect on the common law, the court should consider the statute's temporal relationship to the common law, including which came first. These temporal considerations—which may or may not shed light on the meaning of the text—are not determinative. Rather, they are another source of evidence to consider in assessing text, context, and purpose, and thus legislative intent.

31. In interpreting the RPLA, this Court should consider the temporal relationship between the RPLA and the common law, viewed in their full context. This context includes “the condition of

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<sup>34</sup> *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at para. [146](#), per Côté J.

<sup>35</sup> **See, e.g.:** *Merino v. ING Insurance Company of Canada*, 2019 ONCA 326, at paras. [7](#), [41-44](#), 48; *R. v. Hadvick*, 2024 YKCA 2, at para. [85](#).

<sup>36</sup> *Pioneer Corp. v. Godfrey*, 2019 SCC 42, at para. [85](#).

<sup>37</sup> *Perka v. The Queen*, [1984] 2 S.C.R. 232, at [264-65](#).

things existent at the time of the enactment”.<sup>38</sup> At the “time of the enactment,” “the condition of things” was that the public benefit test did not form part of the common law. Even the majority at the Court of Appeal noted that the public benefit test had been “developed” by the courts in case law beginning in the 1920s.<sup>39</sup>

#### **PART IV — SUBMISSIONS CONCERNING COSTS**

32. As an intervener, ARL asks that no costs be awarded for or against it.

#### **PART V — ORDERS SOUGHT**

33. As an intervener, ARL takes no position on the outcome of the appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8th day of November, 2024.



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**Adam Goldenberg, Connor Bildfell, Gregory  
Ringkamp**

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<sup>38</sup> *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, at paras. [36-37](#).

<sup>39</sup> *Kosicki*, *supra* note 33, at para. [23](#).

**PART VI — TABLE OF AUTHORITIES**

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