

**SULLIVAN
ON THE
CONSTRUCTION OF STATUTES**

Sixth Edition

by

Ruth Sullivan



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must be one whose clients are appropriately referred to as inmates. In Mr. Justice Ryan's view, a mental health centre, even one with a security facility, did not meet this test.

IMPLIED EXCLUSION

§8.89 The final maxim to be considered here is *expressio unius est exclusio alterius*: to express one thing is to exclude another. This maxim reflects a form of reasoning that is widespread and important in interpretation. Côté refers to it as a *contrario* argument.¹⁴⁴ Dickerson refers to it as negative implication.¹⁴⁵ The term "implied exclusion" has been adopted here because it accurately describes the inference underlying this particular maxim.

§8.90 An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. As Laskin J.A. succinctly put it, "legislative exclusion can be implied when an express reference is expected but absent".¹⁴⁶ The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

§8.91 An expectation of express reference can arise in a number of ways. It may arise from the conventions of ordinary language use or from presumptions relating to the way legislation is drafted. It is often grounded in presumptions about the policies or values the legislature is likely to express in its statutes.¹⁴⁷ Two common forms of the implied exclusion argument are examined below under the headings (1) failure to mention comparable items and (2) failure to follow an established pattern.

§8.92 ***Failure to mention comparable items.*** When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned. As explained by Noel, J.A. in *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, dealing with a series of express exceptions, "if a statute specifies one exception (or more) to a general rule, other exceptions are not to be read in. The

¹⁴⁴ See Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Cowansville: Les Éditions Yvon Blais Inc., 1991), at p. 334.

¹⁴⁵ R. Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown & Co., 1975), p. 234.

¹⁴⁶ *University Health Network v. Ontario (Minister of Finance)*, [2001] O.J. No. 4485, at para. 31 (Ont. C.A.).

¹⁴⁷ For discussion of the presumptions of legislative intent, see Chapter 15.

rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended."¹⁴⁸

§8.93 The reasoning here is essentially counterfactual:¹⁴⁹ if the legislature had intended to include comparable items, it would have mentioned them expressly or used a general term sufficiently broad to encompass them; it would not have mentioned some while saying nothing of the others. This reasoning is grounded not only in drafting convention but also in basic principles of communication. If I am with a group of people arranging rides and announce that my car can carry four passengers, my statement would be true and informative even if the car was capable of carrying six. However, my listeners would rightly assume that four was the maximum I could carry. A basic convention of communication is that speakers say as much as is required to achieve the communicative goal.¹⁵⁰ When I send my employee to the store to buy apples, oranges and pears, he or she has no reason to suppose that I also want peaches or grapes. Similarly, when a drafter lists some but not all members of a class, the interpreter fairly infers that only the listed members are to be included.

§8.94 A good example of this form of reasoning is found in *Re Medical Centre Apartments Ltd. and City of Winnipeg*.¹⁵¹ Section 6 of the *Winnipeg General Hospital Act* exempted the hospital's property from certain taxation "if that property is used for hospital purposes". The section went on to provide that "property used ... for necessary parking facilities, interns' quarters, school of nursing, nurses' residence, power house or laundry shall be deemed to be used for hospital purposes". The issue was whether two apartment buildings rented to hospital staff were included in the exemption. Monnin J.A. began his analysis by

¹⁴⁸ [2004] F.C.J. No. 2115, at para. 96 (F.C.A.).

¹⁴⁹ For an explanation of the counterfactual form of argument, see above at §8.40ff.

¹⁵⁰ See Paul Grice, *Studies in the Way of Words* (Cambridge: Harvard University Press, 1989), p. 26.

¹⁵¹ [1969] M.J. No. 47, 3 D.L.R. (3d) 525 (Man. C.A.). See also *Yugraneft Corp. v. Rexx Management Corp.*, [2010] S.C.J. No. 19, 2010 SCC 19, [2010] 1 S.C.R. 649, at para. 39 (S.C.C.); *R. v. B.W.P.*, [2006] S.C.J. No. 27, [2006] 1 S.C.R. 941, at para. 23 (S.C.C.); *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] S.C.J. No. 14, [2006] 1 S.C.R. 513, at paras. 31, 45 (S.C.C.); *Québec (Communauté urbaine) v. Corp. Notre Dame de Bon-Secours*, [1994] S.C.J. No. 78, [1994] 3 S.C.R. 3, at 27-28 (S.C.C.); *Waldick v. Malcolm*, [1991] S.C.J. No. 55, [1991] 2 S.C.R. 456, 125 N.R. 372, at 395-96 (S.C.C.); *R. v. Shublely*, [1990] S.C.J. No. 1, [1990] 1 S.C.R. 3, at 18 (S.C.C.); *Canada (Combines Investigation Act Director of Investigation and Research) v. Newfoundland Telephone Co.*, [1987] S.C.J. No. 79, [1987] 2 S.C.R. 466, at 483-94 (S.C.C.); *Reference re Judicature Act (Alberta)*, s. 27(1), [1984] S.C.J. No. 64, [1984] 2 S.C.R. 697, 14 D.L.R. (4th) 546, at 555-56, 557 (S.C.C.); *Abrahams v. Canada (Attorney General)*, [1983] S.C.J. No. 2, [1983] 1 S.C.R. 2, at 6 (S.C.C.); *Pfizer Co. v. Canada (Deputy Minister of National Revenue, Customs and Excise)*, [1975] S.C.J. No. 126, [1977] 1 S.C.R. 456, at 461-62 (S.C.C.); *Lamont Management Ltd. v. Canada*, [2000] F.C.J. No. 529, at para. 44 (F.C.A.); *R. v. R.J.H.*, [2000] A.J. No. 396, at paras. 15-17 (Alta. C.A.).