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Bristol-Myers Squibb Co. v. Canada (Attorney General), [2005] 1 S.C.R. 533

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

Heard: November 5, 2004;

Judgment: May 19, 2005.

File No.: 29823.

[\[2005\] 1 S.C.R. 533](#) | [\[2005\] 1 R.C.S. 533](#) | [\[2005\] S.C.J. No. 26](#) | [\[2005\] A.C.S. no 26](#) | [2005 SCC 26](#)

Biolyse Pharma Corporation, appellant; v. Bristol-Myers Squibb Company, Bristol-Myers Squibb Canada Inc. and Attorney General of Canada, respondents, and Canadian Generic Pharmaceutical Association and Pfizer Canada Inc., interveners.

(193 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Patents — Patented medicines — Notice of compliance — Whether new drug submission falls within scope of s. 5(1.1) of Patented Medicines (Notice of Compliance) Regulations, SOR/93-133.

Summary:

In the 1970s, information that the bark of the Pacific yew contained *paclitaxel*, an anticarcinogenic component, was discovered by the National Cancer Institute, a government-funded organization in the United States, and put into the public domain. There were practical concerns that insufficient quantities could be made available for large scale pharmaceutical production, however, as the yew bushes died when stripped of their bark. In the 1980s the respondent BMS companies developed a drug containing *paclitaxel*, later marketed as Taxol. In the course of that work it obtained several Canadian patents covering new formulations and methods of administration of the medicine. None of the patents covered *paclitaxel* itself.

Working independently of BMS, the appellant, Biolyse, discovered that *paclitaxel* could be extracted [page534] from a different species of yew without killing it, and applied to the Minister of Health for a notice of compliance ("NOC") in order to market its product. The Minister required Biolyse to submit a New Drug Submission ("NDS") rather than an Abbreviated New Drug Submission ("ANDS") because its different botanical source and its claims for new and different uses for the medicine prevented any reliance on BMS's Taxol as a Canadian reference product. Biolyse prepared and submitted independent clinical studies. The Minister approved the safety and efficacy of the Biolyse product as a new drug and issued Biolyse a NOC in 2001. BMS sought to quash this NOC on the basis that its issuance depended on a finding of bioequivalence to the BMS product.

After repealing the former compulsory licencing system, Parliament wished to facilitate early market entry by generic manufacturers immediately after the expiry of a patent, by eliminating the usual regulatory lag of two years or so before a generic manufacturer could obtain an NOC. However, in order to prevent abuse of these "early working" and "stockpiling" exceptions by the generic companies the government also enacted the *Patented Medicines (Notice of Compliance) Regulations ("NOC Regulations")*. Under the *NOC Regulations*, a patent owner may submit a patent list in respect of any drug that contains a "medicine". If another manufacturer subsequently applies for a NOC for the same drug this "second person" may allege that the patent list filed by the "first person" is not a proper bar. After being served with a Notice of Allegation, the innovator may apply for an order prohibiting the Minister from issuing a NOC until all of the listed patents have expired. This application for prohibition triggers a 24-month statutory freeze on the issuance of a NOC.

On an application for judicial review, the motions judge found that Biolyse had neither applied for nor obtained regulatory approval on the basis of bioequivalence. He ruled that Biolyse was caught by s. 5(1.1) of the *NOC Regulations* however, because both the Biolyse and the BMS products contained *paclitaxel*, even though neither BMS nor Biolyse had any patent claim to *paclitaxel*. He quashed the NOC. The Federal Court of Appeal upheld that decision.

Held (Major, Bastarache and Charron JJ. dissenting): The appeal should be allowed.

[page535]

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ.: The Minister was entitled to issue the NOC to Biolyse on the basis of its NDS without subjecting it to the statutory freeze. An interpretation of the *NOC Regulations* that confers on BMS a monopoly merely by demonstrating the presence of a public domain medicine like *paclitaxel* in its product would provide no value to the public in exchange for the monopoly BMS seeks. When the *NOC Regulations* are considered in their proper context, and in particular in light of the wording of the statutory power that authorized them, the *NOC Regulations* do not have the sweeping effect contended for by BMS. [para. 4] [para. 69]

Parliament enacted the legislation in question in order to protect the rights of patentees by preventing generic manufacturers from marketing "copy-cat drugs" until the expiry of all relevant patents. Under the *NOC Regulations* the court hearing the prohibition application has no discretion to lift the stay even if it thinks the innovator's case for interim relief is weak. Nor does the court have a discretion to leave the contending parties to their remedies under the *Patent Act*. The "second person's" application for a NOC simply goes into deep-freeze until the statutory procedures have played themselves out. [para. 24] [paras. 45-46]

Section 5(1.1) of the *NOC Regulations* does not apply to innovative drugs. It should be confined to

applications for generic copies of patented drugs in the circumstances contemplated by the regulator, namely, where a manufacturer makes a submission for an NOC for a drug which it purports to copy from another generic but in fact copies from the innovator company that has filed the patent list. Furthermore, since Biolyse did not rely on bioequivalence, its product did not fall within the scope of s. 5(1) of the *NOC Regulations* either. The product was properly treated as an innovator drug, rather than a copy-cat drug, and neither ss. 5(1) nor 5(1.1) had any application. [para. 69]

Applying the modern approach to statutory interpretation, the word "submission" in s. 5(1.1) cannot be isolated from this context and from the scope of the regulation making power in s. 55.2(4) of the *Patent Act*, which permits a generic manufacturer to work the patented invention within the 20-year period ("the early working exception") to the extent necessary to obtain a NOC at the time the patent(s) expired and to "stockpile" generic product towards the end of the 20-year period to [page536] await lawful market entry. The grammatical and ordinary sense of the words and the precise scope of the word "submission" in s. 5(1.1) must be given a purposive interpretation within this context. Secondly, in analyzing the more specific schemes of the *Patent Act* and the Minister's regulation-making power, it is apparent that the *NOC Regulations* are directed to persons who are making use of the "patented invention" which is not necessarily co-extensive with the patented drug or the patented claims. BMS has no patent on *paclitaxel* and the mere fact *paclitaxel* is found in the Biolyse product does not mean that Biolyse took advantage of BMS inventions for the purpose of "early working" a generic copy or "stockpiling" in anticipation of the expiry of the BMS patents. Moreover, the limiting words of s. 55.2(4) do not disturb the usual requirement that regulations must fall within the regulation making power. The "plain meaning" adopted by the Federal Court of Appeal in this case would suggest that s. 5(1.1) is *ultra vires* the very specific authority given by s. 55.2(4). Finally, the internal structure of the *NOC Regulations* supports a narrower interpretation. The word "submission" is also used in s. 4(1), which provides the template upon which s. 5(1.1) is modelled, and s. 4(1) has been held not to apply to all submissions. Any other interpretation of s. 4(1) would allow innovator companies to sidestep the time limits applicable to patent lists by the simple expedient of making corporate or technical changes to their filing by way of what is called a supplementary NDS. In this context, the courts have found that an unqualified and unrestricted interpretation of the word "submission" would be destructive of regulatory intent. [para. 11] [paras. 41-61] [para. 67]

The interpretation of s. 5(1.1) accepted by the courts below would lead to an absurd result. The "medicine" in the drug to which the patent list relates need not itself be patented, or indeed, owe anything to the ingenuity of the "first" person. So long as such "medicine" shows up as a component, however minor, in the chemical composition of the drug to which the patent list relates, the "second person" (including an innovator who is seeking to manufacture a new and useful drug) will be barred from proceeding to market by the automatic statutory freeze, and this bar will continue for so long as the patent list holder can evergreen its product by resort to patentable improvements to other components or additions. This would stifle competition and innovation in the pharmaceutical industry and produce a result [page537] at odds with what the regulator was trying to achieve. [para. 66]

Per Major, Bastarache and Charron JJ. (dissenting): The Minister was not entitled to issue the NOC to Biolyse. Where, as here, s. 5 of the *NOC Regulations* applies to a drug manufacturer, a NOC cannot be issued by the Minister under s. 7 unless the manufacturer makes a submission and serves a Notice of Allegation ("NOA") on the originating, innovator manufacturing company, to advise the latter that it is seeking approval of a drug containing a medicine found in the innovator company's already approved drug. [para. 74]

The ordinary and grammatical meaning of s. 5(1.1) is unambiguous and clearly indicates that Biolyse's submission for a NOC falls within the purview of that provision. First, s. 5(1) did not apply to the current situation because Biolyse did not make reference to Taxol for the purpose of demonstrating bioequivalence. Second, Biolyse filed a submission for a NOC and it is settled law that "a submission for a notice of compliance" in s. 5(1.1) includes a NDS and an ANDS, as well as a supplement to either of these submissions. Third, s. 5(1.1) was triggered because Biolyse's Paclitaxel contained the same medicine, employed the same route of administration and had a comparable strength and dosage form as Taxol, a drug already marketed in Canada pursuant to a NOC issued to BMS and in respect of which a patent list had

been submitted. The term "medicine" in s. 5(1.1) is not limited to patented medicines. Biolyse therefore had to make an allegation in its submission pursuant to s. 5(1.1)(b) and, until it complied, the Minister was prohibited by s. 7(1)(b) from issuing a NOC in respect of Paclitaxel for injection. This legislative scheme cannot work without its main tool: the NOA. The ability to circumvent the NOA would render the patent list an empty shell. [paras. 107-121]

Furthermore, regarding the broader and external contexts of s. 5(1.1), the *NOC Regulations*, the regulation-making power set out in s. 55.2 of the *Patent Act* and the legislative history of s. 5(1.1), all support the ordinary and grammatical meaning of that provision. This meaning is consistent with the purpose of the *NOC Regulations* and s. 55.2, which is to protect the rights of patent holders. Section 5(1.1) is also a proper exercise of regulatory power conferred under s. 55.2(4) of the Act as it strives to stop a second entry manufacturer from circumventing the *NOC Regulations* by [page538] forcing it to address the question of infringement. Lastly, the evolution of s. 5(1.1) demonstrates how the government was active in its efforts to transform and broaden the provision. [paras. 152-153] [para. 159]

Section 5(1.1) cannot reasonably be restricted to an ANDS. Such an attempt to restrict the circumstances under which a NOA must be sent cannot possibly be in accordance with the purpose of the *NOC Regulations* and s. 55.2 of the *Patent Act*. Moreover, if s. 5(1.1) required a demonstration of bioequivalence, it would never be invoked because, where a comparison is made to demonstrate bioequivalence, the provisions of s. 5(1) apply. Accordingly, an interpretation that renders a section redundant should be rejected in favour of one that is consistent with s. 5 as a whole. [para. 151] [para. 179]

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By Binnie J.

Applied: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; distinguished: *Nu-Pharm Inc. v. Canada (Attorney General)*, [1999] 1 F.C. 620; considered: *Monsanto Canada Inc. v. Schmeiser*, [2004] 1 S.C.R. 902, 2004 SCC 34; *Bristol-Myers Squibb Canada Inc. v. Canada (Attorney General)* (2001), 10 C.P.R. (4th) 318, aff'd (2002), 16 C.P.R. (4th) 425, 2002 FCA 32; *Ferring Inc. v. Canada (Attorney General)* (2003), 26 C.P.R. (4th) 155, 2003 FCA 274; *Toba Pharma Inc. v. Canada (Attorney General)* (2002), 21 C.P.R. (4th) 232, 2002 FCT 927; *AstraZeneca Canada Inc. v. Canada (Minister of Health)* (2004), 36 C.P.R. (4th) 58, 2004 FC 736; *Merck & Co. v. Canada (Attorney General)* (1999), 176 F.T.R. 21, aff'd (2000), 5 C.P.R. (4th) 138; referred to: *Whirlpool Corp. v. Camco Inc.*, [2000] 2 S.C.R. 1067, 2000 SCC 67; *Free World Trust v. Électro Santé Inc.*, [2000] 2 S.C.R. 1024, 2000 SCC 66; *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, aff'd [1994] 3 S.C.R. 1100; *Imperial Chemical Industries PLC v. Novopharm Ltd.* (1991), 35 C.P.R. (3d) 137; *Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)*, [1998] 2 S.C.R. 193; *Francis v. Baker*, [1999] 3 S.C.R. 250.

By Bastarache J. (dissenting)

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1 S.C.R. 27; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42; H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401, 2005 SCC 25; Marche v. Halifax Insurance Co., [2005] 1 S.C.R. 47, 2005 SCC 6; Harvard College v. Canada (Commissioner of Patents), [2002] 4 S.C.R. 45, 2002 SCC 76; Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3; Francis v. Baker, [1999] 3 S.C.R. 250; United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, 2004 SCC 19; Spar Aerospace Ltd. v. American Mobile Satellite Corp., [2002] 4 S.C.R. 205, 2002 SCC 78; R. v. McDonald (2002), 209 N.S.R. (2d) 283; Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn., [1993] 3 S.C.R. 724; Apotex Inc. v. Canada (Minister of Health) (1999), 87 C.P.R. (3d) 271; Bristol-Myers Squibb Canada Inc. v. Canada (Attorney General) (2001), 10 C.P.R. (4th) 318, aff'd (2002), 16 C.P.R. (4th) 425, 2002 FCA 32; Toba Pharma Inc. v. Canada (Attorney General) (2002), 21 C.P.R. (4th) 232, 2002 FCT 927; Ferring Inc. v. Canada (Attorney General) (2003), 26 C.P.R. (4th) 155, 2003 FCA 274; AstraZeneca Canada Inc. v. Canada (Minister of Health) (2004), 36 C.P.R. (4th) 58, 2004 FC 736; GlaxoSmithKline Inc. v. Canada (Attorney General), (2004), 38 C.P.R. (4th) 27, 2004 FC 1302; Gerber Garment Technology Inc. v. Lectra Systems Ltd., [1997] R.P.C. 443; Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare) (1998), 84 C.P.R. (3d) 492, aff'd (2000), 8 C.P.R. (4th) 48; Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare) (1994), 55 C.P.R. (3d) 302; Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare), [1998] 2 S.C.R. 193; Merck Frosst Canada Inc. v. Apotex Inc., [1997] 2 F.C. 561; Willick v. Willick, [1994] 3 S.C.R. 670; R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, 2001 SCC 56; RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311; Friesen v. Canada, [1995] 3 S.C.R. 103; Bayer Inc. v. Canada (Attorney General) (1999), 87 C.P.R. (3d) 293; Eli Lilly & Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129; R. v. McIntosh, [page540] [1995] 1 S.C.R. 686; R. v. Hinchey, [1996] 3 S.C.R. 1128; R. v. Proulx, [2000] 1 S.C.R. 61, 2000 SCC 5; Degelder Construction Co. v. Dancorp Developments Ltd., [1998] 3 S.C.R. 90; Zeitel v. Ellscheid, [1994] 2 S.C.R. 142; David Bull Laboratories (Canada) Inc. v. Pharmacia Inc., [1995] 1 F.C. 588.

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Strayer, Nadon and Evans J.J.A.), [2003] 4 F.C. 505, 226 D.L.R. (4th) 138, 303 N.R. 63, 24 C.P.R. (4th) 417, [2003] F.C.J. No. 566 (QL), 2003 FCA 180, upholding a decision of Blanchard J. (2002), 224 F.T.R. 236, 22 C.P.R. (4th) 345, [2002] F.C.J. No. 1638 (QL), 2002 FCT 1205, granting an application for judicial review and setting aside a notice of compliance issued by the Minister of Health in respect of a drug. Appeal allowed, Major, Bastarache and Charron J.J. dissenting.

Counsel

Andrew J. Roman, for the appellant.

Anthony G. Creber and Patrick S. Smith, for the respondents Bristol-Myers Squibb Company and Bristol-Myers Squibb Canada Inc.

No one appeared for the respondent the Attorney General of Canada.

Written submission only by Edward Hore, for the intervener the Canadian Generic Pharmaceutical Association.

John Terry and Conor McCourt, for the intervener Pfizer Canada Inc.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella J.J. was delivered by

BINNIE J.

1 Our Court has often spoken of "the balance struck under the *Patent Act*" in which the public gives an inventor the right to prevent anybody else from using his or her invention for a period of 20 years in exchange for disclosure of what has been invented. As a general rule, if the patent holder obtains a monopoly for something which does not fulfil the statutory requirements of novelty, ingenuity and utility, then the public is short-changed. See *Whirlpool Corp. v. Camco Inc.*, [2000] 2 S.C.R. 1067 [page543], 2000 SCC 67, and *Free World Trust v. Électro Santé Inc.*, [2000] 2 S.C.R. 1024, 2000 SCC 66.

2 In the present appeal, the Court is required to consider this "balance" in the much-litigated field of patented medicines, where Parliament is concerned not only with the balance between inventors and potential users, but between the protection of intellectual property on the one hand and, on the other hand, the desire to reduce health care costs while being fair to those whose ingenuity brought the drugs into existence in the first place.

3 The drug in dispute contains a cancer-fighting medicine called *paclitaxel*. *Paclitaxel* was discovered by the

- 1iv) no claim for the medicine itself and no claim for the use of the medicine would be infringed by the making, constructing, using or selling by that person of the drug for which the submission for the notice of compliance is filed.

1V. Analysis

34 As always, the facts are important. BMS sought to quash the NOC issued to Biolyse on the basis that its issuance depended on the Minister's [page556] finding that the Biolyse product was "bioequivalent" to the BMS product. It was therefore a "copy-cat" drug which s. 5(1) of the *NOC Regulations* required the Minister to put into the statutory freeze. The BMS position was rejected both by the Minister and by the motions judge. It is useful to quote the language of the motions judge:

Biolyse did not compare its drug or make reference to another drug for the purpose of demonstrating bioequivalence. Biolyse did not apply for a declaration of equivalence nor was one granted.

On the evidence, the Biolyse submission contains clinical studies on sick patients; specifically those with advanced breast cancer unresponsive to usual treatments and those with locally advanced non-small-cell lung cancer. The safety and efficacy of the Biolyse product assessment was based on those studies and on what was known to scientists in the public realm about paclitaxel. This is consistent with the usual procedure for a NDS. [Emphasis added; paras. 39-40.]

This finding was not challenged by BMS in the Federal Court of Appeal (para. 15). We must therefore proceed on the basis that the Biolyse product was properly treated as an innovator drug rather than a copy-cat drug.

35 The motions judge went on to rule that Biolyse was nevertheless caught by s. 5(1.1) of the *NOC Regulations* because both the Biolyse product and the BMS product contain *paclitaxel*, even though neither BMS nor Biolyse have any patent claim to *paclitaxel*, which, as stated, was put into the public domain by the U.S. government supported National Cancer Institute.

36 We therefore come to the legal issue that lies at the heart of this appeal, namely the conflicting interpretations of s. 5(1.1) of the *NOC Regulations*. On the question of interpretation, the Minister's opinion is not entitled to deference. The Federal Court quite properly said that the standard of review on that point is correctness.

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37 BMS argues that once it is established that *paclitaxel* is present in the Biolyse product, s. 5(1.1) bars the issuance of a NOC. Biolyse responds that the BMS approach is too simplistic. Biolyse invokes the modern approach to statutory interpretation, which it says is equally applicable to regulations, as set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. In that case, the Ontario *Employment Standards Act* provided for termination pay and severance pay for workers where their employment was terminated by an employer. Rizzo Shoes went bankrupt. The trustee disallowed the workers' claims because their jobs had been terminated by the bankruptcy, not by the employer. The Ontario courts agreed with the trustee. This Court reversed, Iacobucci J. observing as follows:

At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature: nor was the context of the words in issue appropriately recognized. I now [page558] turn to a discussion of these issues. [Emphasis added; paras. 20, 21 and 23.]

38 The same edition of Driedger adds that in the case of regulations, attention must be paid to the terms of the enabling statute:

It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.

(Elmer A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 247)

This point is significant. The scope of the regulation is constrained by its enabling legislation. Thus, one cannot simply interpret a regulation the same way one would a statutory provision. In this case, the distinction is crucial, for when viewed in that light the impugned regulation cannot take on the meaning suggested by BMS. Moreover, while the respondents' argument draws some support from the language of s. 5(1.1) isolated from its context, it overlooks a number of significant aspects of the "modern approach".

A. *The Grammatical and Ordinary Sense of the Words*

39 For ease of reference, I repeat the triggering words of s. 5(1.1) of the *NOC Regulations*:

5. (1.1) Subject to subsection (1.2), where subsection (1) does not apply and where a person files or has filed a submission for a notice of compliance in respect of a drug that contains a medicine found in another drug that has been marketed in Canada pursuant to a notice of compliance issued to a first person and in respect of which a patent list has been submitted, the person shall, in the submission, with respect to each patent included on the register in respect of the other drug containing the medicine, where the drug has the same route of administration and a comparable strength and dosage form,

(a) state that the person accepts that the notice of compliance will not issue until the patent expires;
or

[page559]

(b) allege that

(i) the statement made by the first person pursuant to paragraph 4(2)(c) is false,

1ii) the patent has expired,

1iii) the patent is not valid, or

1iv) no claim for the medicine itself and no claim for the use of the medicine would be infringed by the making, constructing, using or selling by that person of the drug for which the submission for the notice of compliance is filed.

40 The word "submission" provides the gateway into s. 5(1.1) but the term is not defined in the *NOC Regulations*.

41 BMS argues that "submission" must include *any* submission including a NDS for an innovator drug. Using this interpretation, s. 5(1.1) would apply, even if the common component is an old medicine like aspirin used in a minor amount. The BMS drug Taxol contains *paclitaxel*. *Paclitaxel* is clearly a medicine. BMS has filed a patent list in relation to its formulation of Taxol. The Biolyse drug also contains *paclitaxel*. It is administered by the same route (injection) and is in "comparable strength and dosage form". Therefore BMS argues that the statutory freeze should apply irrespective of what role, if any, BMS played in the discovery of *paclitaxel*.

42 Biolyse contends that not all "submissions" to the Minister are caught by s. 5(1.1), and on this point it is supported by the intervener Pfizer Canada Inc., itself an innovator drug company. Pfizer argues that s. 5(1.1) does not apply to certain types of submissions (in its case Supplementary New Drug Submissions ("SNDS")) which are outside the policy objective s. 5(1.1) was intended to implement. Biolyse agrees that s. 5(1.1) should be construed by reference to the policy objective, and in particular that it should not apply to an innovator drug NDS (as the motions judge found its [page560] product had correctly been classified by the Minister) but only to submissions for generic "copy-cat" drugs which use a "Canadian reference product" and are applied for under an ANDS.

43 While at first blush the word "submission" would appear to be all inclusive, this Court held in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, that

one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations... .

... It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" [Emphasis added; paras. 29-30.]

44 It is therefore necessary to suspend judgment on the precise scope of the word "submission" in s. 5(1.1) and turn to other elements of the Driedger approach. As Professor J. M. Kernochan puts it: "The precise words which are in issue in relation to the facts must be weighed in the light of successive circles of context" ("Statutory Interpretation: An Outline of Method" (1976), 3 Dal. L.J. 333, at pp. 348-49).

B. *The General Context*

45 This Court has accepted the view that Parliament enacted Bill C-91 "with the intent of thwarting the possible appropriation by generic drug companies, such as Apotex, of the research and development initiatives of innovators, such as Merck" (*Apotex v. Canada (Attorney General)*, per Robertson J.A., at p. 752 (emphasis added), whose reasons were substantially adopted by this Court at [1994] 3 S.C.R. 1100).

[page561]

46 The Regulatory Impact Analysis Statement, which accompanied but did not form part of the *NOC Regulations*, confirms that this was the intention of the regulator. It says that following the abolition of the compulsory licensing system, the government enacted the *NOC Regulations* in order to protect the right of patentees by preventing generic manufacturers from marketing their products until the expiry of all relevant patents (*Merck & Co. v. Canada (Attorney General)* (1999), 176 F.T.R. 21, at para. 51). The relevant portion of the Regulatory Impact Analysis Statement reads:

... As a general rule, judicial remedies are sufficient to address patent infringement. However, with the enactment of Bill C-91 the government has created an exception to patent infringement allowing generic competitors to undertake any activities necessary to work up a submission to obtain regulatory approval

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Document (1)

1. *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601

Client/Matter: -None-

Search Terms: 2005 SCC 54

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
-None-

 ***Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601**

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

Heard: March 8, 2005;

Judgment: October 19, 2005.

File No.: 30290.

[\[2005\] 2 S.C.R. 601](#) | [\[2005\] 2 R.C.S. 601](#) | [\[2005\] S.C.J. No. 56](#) | [\[2005\] A.C.S. no 56](#) | [2005 SCC 54](#)

Her Majesty The Queen, appellant; v. Canada Trustco Mortgage Company, respondent.

(81 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Income tax — Tax avoidance — Interpretation and application of general anti-avoidance rule — Mortgage company claiming substantial capital cost allowance following sale-leaseback transactions involving trailers — Whether general anti-avoidance rule applicable to deny tax benefit — Income Tax Act, *R.S.C. 1985, c. 1 (5th Supp.), s. 245.*

Summary:

CTMC carries on business as a mortgage lender, and as part of its business operations, it obtains large revenues from leased assets. CTMC purchased a number of trailers which it then circuitously leased back to the vendor in order to offset revenue from its leased assets by claiming a substantial capital cost allowance ("CCA") on the trailers for the 1997 taxation year. This arrangement allowed CTMC to defer paying taxes on the amount of profits reduced by the CCA deductions, which would be subject to recapture into income when the trailers were disposed of at a future date. The Minister of National Revenue reassessed CTMC and disallowed the CCA claim. On appeal, the Tax Court of Canada set aside the Minister's decision. The court found that the transaction fell within the spirit and purpose of the CCA provisions of the *Income Tax Act*, and concluded that the general anti-avoidance rule ("GAAR") in s. 245 of the Act did not apply to deny the tax benefit. The Federal Court of Appeal affirmed the Tax Court's decision.

[page602]

Held: The appeal should be dismissed.

The application of the GAAR involves three steps. It must be determined: (1) whether there is a tax benefit arising from a transaction or series of transactions within the meaning of s. 245(1) and (2) of the *Income Tax Act*; (2) whether the transaction is an avoidance transaction under s. 245(3), in the sense of not being "arranged primarily for *bona fide* purposes other than to obtain the tax benefit"; and (3) whether there was abusive tax avoidance under s. 245(4), in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit or purpose of the provisions relied upon by the taxpayer. The burden is on the taxpayer to refute points (1) and (2), and on the Minister to establish point (3). Since the Crown has agreed with the Tax Court's finding that there was a tax benefit and an avoidance transaction, the only issue in this case is whether there was abusive tax avoidance under s. 245(4). [para. 17] [paras. 66-67]

Section 245(4) imposes a two-part inquiry. First, the courts must conduct a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit in order to determine why they were put in place and why the benefit was conferred. The goal is to arrive at a purposive interpretation that is harmonious with the provisions of the Act that confer the tax benefit, read in the context of the whole Act. Second, the court must examine the factual context of the case in order to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue. Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be insufficient by itself to establish abusive tax avoidance. The central issue is the proper interpretation of the relevant provisions in light of their context and purpose. Abusive tax avoidance may be found where the relationships and transactions as expressed in the relevant documentation lack a proper basis relative to the object, spirit or purpose of the provisions that are purported to confer the tax benefit, or where they are wholly dissimilar to the relationships or transactions contemplated by the provisions. In the end, if the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer. [para. 55] [para. 58] [para. 66]

[page603]

Once the provisions of the *Income Tax Act* are properly interpreted, it is a question of fact for the Tax Court judge whether the Minister, in denying the tax benefit, has established abusive tax avoidance under s. 245(4). Provided the Tax Court judge has proceeded on a proper construction of the provisions of the Act and on findings supported by the evidence, appellate tribunals should not interfere, absent a palpable and overriding error. [para. 46]

Here, the Tax Court judge's decision must be upheld. His conclusions were based on a correct view of the law and were grounded in the evidence. The transaction at issue was not so dissimilar from an ordinary sale-leaseback as to take it outside the object, spirit or purpose of the relevant CCA provisions of the Act. The purpose of the CCA provisions of the Act, as applied to sale-leaseback transactions, was, as found by the Tax Court judge, to permit the deduction of a CCA based on the cost of the assets acquired. This purpose emerges clearly from the scheme of the Act's CCA provisions as a whole. The Minister's suggestion that the

usual result of the CCA provisions of the Act should be overridden by s. 245(4) in the absence of real financial risk or "economic cost" in the transaction must be rejected. This suggestion distorts the purpose of the CCA provisions by reducing them to apply only when sums of money are at economic risk. The applicable CCA provisions of the Act do not refer to economic risk. They refer only to "cost" and in view of the text and context of the CCA provisions, they use "cost" in the well-established sense of the amount paid to acquire the assets. Where Parliament has wanted to introduce economic risk into the meaning of cost related to CCA provisions, it has done so expressly. [paras. 74-75] [para. 78] [para. 80]

Cases Cited

Not followed: *OSFC Holdings Ltd. v. Canada*, [2002] 2 F.C. 288, 2001 FCA 260; **referred to:** *Mathew v. Canada*, [2005] 2 S.C.R. 643, 2005 SCC 55; 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804; *Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622; *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *Craven v. White*, [1989] A.C. 398; *W. T. Ramsay Ltd. v. Inland Revenue Commissioners*, [1981] 1 All E.R. 865; *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336; *Water's Edge Village Estates (Phase II) Ltd. v. Canada*, [2003] 2 F.C. 25, 2002 FCA 291.

[page604]

Statutes and Regulations Cited

Budget Implementation Act, 2004, No. 2, S.C. 2005, c. 19, s. 52.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 13(7.1), (7.2), 20(1)(a), 245(1) to (5), 248(10).

Authors Cited

Canada. Department of Finance. *Explanatory Notes to Legislation Relating to Income Tax*. Ottawa: Queen's Printer, 1988.

Duff, David G. "Judicial Application of the General Anti-Avoidance Rule in Canada: *OSFC Holdings Ltd. v. The Queen*" (2003), 57 I.B.F.D. Bulletin 278.

Hogg, Peter W., and Joanne E. Magee. *Principles of Canadian Income Tax Law*, 4th ed. Scarborough, Ont.: Carswell, 2002.

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Rothstein, Evans and Pelletier JJ.A.) [2004] 2 C.T.C. 276, 2004 D.T.C. 6119, [2004] F.C.J. No. 249 (QL), 2004 FCA 67, affirming a decision of Miller J.T.C.C., [2003] 4 C.T.C. 2009, 2003 D.T.C. 587, [2003] T.C.J. No. 271 (QL), 2003 TCC 215. Appeal dismissed.

Counsel

Graham Garton, Q.C., Anne-Marie Lévesque and Alexandra K. Brown, for the appellant.

Al Meghji, Monica Biringer and Gerald Grenon, for the respondent.

The judgment of the Court was delivered by

McLACHLIN C.J. and MAJOR J.

1. Introduction

1 This appeal and its companion case, *Mathew v. Canada*, [2005] 2 S.C.R. 643, 2005 SCC 55 (hereinafter "*Kaulius*"), raise the issue of the interplay between the general anti-avoidance rule ("GAAR") and the application of more specific provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The Act continues to permit legitimate tax minimization; traditionally, this has involved determining whether the taxpayer brought itself within the wording of the specific provisions relied on for [page605] the tax benefit. Onto this scheme, the GAAR has superimposed a prohibition on abusive tax avoidance, with the effect that the literal application of provisions of the Act may be seen as abusive in light of their context and purpose. The task in this appeal is to unite these two approaches in a framework that reflects the intention of Parliament in enacting the GAAR and achieves consistent, predictable and fair results.

2. Facts

2 The respondent, Canada Trustco Mortgage Company ("CTMC"), carries on business as a mortgage lender. As part of its business operations, CTMC enjoyed large revenues from leased assets. In 1996 it purchased a number of trailers which it then circuitously leased back to the vendor, in order to offset revenue from its leased assets by claiming considerable capital cost allowance ("CCA") on the trailers in the amount of \$31,196,700 against \$51,787,114 for the 1997 taxation year. The essence of the transaction is explained in the memorandum of Michael Lough, CTMC's officer in charge of the recommendation to proceed: "The transaction provides very attractive returns by generating CCA deductions which can be used to shelter other taxable lease income generated by Canada Trust." This arrangement allowed CTMC to defer paying taxes on the amount of profits reduced by the CCA deductions which would be subject to recapture into income when the trailers were disposed of at a future date and presumably in excess of the amount claimed as CCA.

3 The details of the transaction are complex and described in greater detail in the Appendix. Briefly stated, on December 17, 1996, CTMC, with the use of its own money and a loan of approximately \$100 million from the Royal Bank of Canada, purchased trailers from Transamerica Leasing Inc. ("TLI") at fair market value of \$120 million. CTMC leased the trailers to Maple Assets Investments Limited ("MAIL") who in turn subleased them to TLI, the original owner. TLI then prepaid all amounts due to MAIL under the [page606] sublease. MAIL placed on deposit an amount equal to the loan for purposes of making the lease payments and a bond was pledged as security to guarantee a purchase option payment to CTMC at the end of the lease. These transactions allowed

(d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

[page608]

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

...

248. ...

(10) [Series of transactions] For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.

7 A recent amendment to s. 245 (*Budget Implementation Act, 2004, No. 2, S.C. 2005, c. 19, s. 52*) has no application to the judgments under appeal. Although this amendment was enacted to apply retroactively, it cannot apply at this stage of appellate review, after the parties argued their cases and the Tax Court judge rendered his decision on the basis of the GAAR as it read prior to the amendment. Furthermore, even if this amendment were to apply, it would not warrant a different approach to the issues on appeal. In our view, this amendment to s. 245 serves *inter alia* to make it clear that the GAAR applies to tax benefits conferred by Regulations enacted under the *Income Tax Act*. The Tax Court judge in the instant case proceeded on this assumption, which was not challenged by the parties in submissions before us.

4. Judicial Decisions

4.1

Tax Court of Canada, [2003] 4 C.T.C. 2009, 2003 TCC 215

8 The Tax Court judge found an avoidance transaction giving rise to a tax benefit under s. 245(1) and (3) of the Act. He inquired into the purpose of the CCA provisions of the *Income Tax Act* as applied to sale-leaseback arrangements, in order to determine if the transaction was abusive under s. 245(4) of the Act. He held that the purpose of the [page609] CCA provisions permitted the deduction of CCA based on the "cost" of the trailers, as defined by the transactions documents. He went on to conduct a detailed analysis of the legal transactions. He found that CTMC had acquired title and became the legal owner of the trailers, and declined to recharacterize the legal nature of the transaction. The transactions in issue, in his view, amounted to an ordinary sale-leaseback. The Tax Court judge found that the transaction fell within the spirit and purpose of the CCA provisions of the Act, and concluded that the GAAR did not apply to disallow the tax benefit.

Federal Court of Appeal, [2004] 2 C.T.C. 276, 2004 FCA 67

9 The Federal Court of Appeal unanimously dismissed the appeal, relying on the reasons in *OSFC Holdings Ltd. v. Canada*, [2002] 2 F.C. 288, 2001 FCA 260 ("OSFC"), in which the court had set out a two-stage analysis for abuse under the GAAR, focussed first on interpretation of the specific provisions at issue, second on the overarching policy of the *Income Tax Act*. Evans J.A., for the court, held that the Tax Court judge had not erred in concluding that, for the purposes of s. 245(4) of the Act, the transactions at issue did not constitute a misuse of a provision of the Act or an abuse of the CCA scheme as a whole. He noted that counsel for the appellant did not seek to recharacterize the transactions and did not allege that they were a sham, but argued instead that the policy underlying s. 20(1)(a) and the CCA provisions as a whole was "to permit taxpayers to claim CCA in respect of the 'real' or 'economic' cost that they incurred in acquiring an asset, and not the 'legal' cost, that is, on the facts of this case, the purchase price paid by the taxpayer" (para. 2). Going on to consider policy, Evans J.A. found that there was no clear and unambiguous policy underlying s. 20(1)(a) or the CCA scheme read as a whole that rendered the transaction a misuse or abuse of those provisions.

[page610]

5. Analysis

5.1 *General Principles of Interpretation*

10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

11 As a result of the Duke of Westminster principle (*Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

12 The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, [page611]

predictability and fairness so that taxpayers may manage their affairs intelligently. As stated at para. 45 of *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622:

[A]bsent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way. [Emphasis added.]

See also 65302 *British Columbia*, at para. 51, per Iacobucci J. citing P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76:

It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.

13 The *Income Tax Act* remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation. Onto this compendium of detailed stipulations, Parliament has engrafted quite a different sort of provision, the GAAR. This is a broadly drafted provision, intended to negate arrangements that would be permissible under a literal interpretation of other provisions of the *Income Tax Act*, on the basis that they amount to abusive tax avoidance. To the extent that the GAAR constitutes a "provision to the contrary" as discussed in *Shell* (at para. 45), the Duke of Westminster principle and the emphasis on textual interpretation may be attenuated. Ultimately, as affirmed in *Shell*, "[t]he courts' role is to interpret and apply the Act as it was adopted by Parliament" (para. 45). The court must to the extent possible contemporaneously give effect to both the GAAR and the other provisions of the *Income Tax Act* relevant to a particular transaction.

[page612]

5.2 Interpretation of the GAAR

14 The GAAR was enacted in 1988, principally in response to *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, which rejected a literal approach to interpreting the Act. At the same time, the Court rejected the business purpose test, which would have restricted tax reduction to transactions with a real business purpose. Instead of the business purpose test, the Court proposed guidelines to limit unacceptable tax avoidance arrangements. Parliament deemed the decision in *Stuart* an inadequate response to the problem and enacted the GAAR.

15 The *Explanatory Notes to Legislation Relating to Income Tax* issued by the Honourable Michael H. Wilson, Minister of Finance (June 1988) ("Explanatory Notes") are an aid to interpretation. The Explanatory Notes state at the outset that they "are intended for information purposes only and should not be construed as an official interpretation of the provisions they describe". They state the purpose of the GAAR at p. 461:

New section 245 of the Act is a general anti-avoidance rule which is intended to prevent abusive tax avoidance transactions or arrangements but at the same time is not intended to interfere with legitimate commercial and family transactions. Consequently, the new rule seeks to distinguish between legitimate tax planning and abusive tax avoidance and to establish a reasonable balance between the protection of the tax base and the need for certainty for taxpayers in planning their affairs.

16 The GAAR draws a line between legitimate tax minimization and abusive tax avoidance. The line is far from bright. The GAAR's purpose is to deny the tax benefits of certain arrangements that comply with a literal interpretation of the provisions of the Act, but amount to an abuse of the provisions of the Act. But precisely what constitutes abusive tax avoidance remains the subject of debate. Hence these appeals.

17 The application of the GAAR involves three steps. The first step is to determine whether [page613] there is a

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Document (1)

1. *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559

Client/Matter: -None-

Search Terms: 2002 SCC 42

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
-None-



Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559

Supreme Court Reports

Supreme Court of Canada

Present: L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

2001: December 4 / 2002: April 26.

[page560]

File No.: 28227.

[\[2002\] 2 S.C.R. 559](#) | [\[2002\] 2 R.C.S. 559](#) | [\[2002\] S.C.J. No. 43](#) | [\[2002\] A.C.S. no 43](#) | [2002 SCC 42](#)

Bell ExpressVu Limited Partnership, appellant; v. Richard Rex, Richard Rex, c.o.b. as 'Can-Am Satellites', and c.o.b. as 'Can Am Satellites' and c.o.b. as 'CanAm Satellites' and c.o.b. as 'Can Am Satellite' and c.o.b. as 'Can Am Sat' and c.o.b. as 'Can-Am Satellites Digital Media Group' and c.o.b. as 'Can-Am Digital Media Group' and c.o.b. as 'Digital Media Group', Anne Marie Halley a.k.a. Anne Marie Rex, Michael Rex a.k.a. Mike Rex, Rodney Kibler a.k.a. Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, John Doe 1 to 20, Jane Doe 1 to 20 and any other person or persons found on the premises or identified as working at the premises at 22409 McIntosh Avenue, Maple Ridge, British Columbia, who operate or work for businesses carrying on business under the name and style of 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group', 'Digital Media Group', or one or more of them, respondents, and The Attorney General of Canada, the Canadian Motion Picture Distributors Association, DIRECTV, Inc., the Canadian Alliance for Freedom of Information and Ideas, and the Congres Iberoamericain du Canada, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (68 paras.)

Case Summary

Communications law — Radiocommunications — Direct-to-home distribution of television programming — Decoding in Canada of encrypted signals originating from foreign satellite distributor — Whether s. 9(1)(c) of Radiocommunication Act prohibits decoding of all encrypted satellite signals, with a limited exception, or whether it bars only unauthorized decoding of signals that emanate from licensed Canadian distributors — Radiocommunication Act, *R.S.C. 1985, c. R-2, s. 9(1)(c)*.

Statutes — Interpretation — Principles — Contextual approach — Grammatical and ordinary sense — "Charter values" to be used as an interpretive principle only in circumstances of genuine ambiguity.

Appeals — Constitutional questions — Factual record necessary for constitutional questions to be answered.

The appellant engages in the distribution of direct-to-home (DTH) television programming and encrypts its signals to control reception. The respondents sell U.S. decoding systems to Canadian customers that enable them to receive and watch U.S. DTH programming. They also provide U.S. mailing addresses to their customers who do not have one, since the U.S. broadcasters will not knowingly authorize their signals to be decoded by persons outside the United States. The appellant, as a licensed distribution undertaking, brought an action in the British Columbia Supreme Court, pursuant to ss. 9(1)(c) and 18(1) of the Radiocommunication Act, requesting in part an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. Section 9(1)(c) enjoins the decoding of encrypted signals without the authorization of the "lawful distributor of the signal or feed". The chambers judge declined to grant the injunctive relief. A majority of the Court of Appeal held that there is no contravention of s. 9(1)(c) where a person decodes unregulated signals such as those broadcast by the U.S. DTH companies, and dismissed the appellant's appeal.

[page561]

Held: The appeal should be allowed. Section 9(1)(c) of the Act prohibits the decoding of all encrypted satellite signals, with a limited exception.

It is necessary in every case for the court charged with interpreting a provision to undertake the preferred contextual and purposive interpretive approach before determining that the words are ambiguous. This requires reading the words of the Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids, including other principles of interpretation such as the strict construction of penal statutes and the "Charter values" presumption.

When the entire context of s. 9(1)(c) is considered, and its words are read in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, there is no ambiguity and accordingly no need to resort to any of the subsidiary principles of statutory interpretation. Because the Radiocommunication Act does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(e), which forbids their unauthorized retransmission within Canada) and only concerns decrypting that occurs in Canada or other locations contemplated in s. 3(3), this does not give rise to any extra-territorial exercise of authority. Parliament intended to create an absolute bar on Canadian residents' decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization. The U.S. DTH distributors in the present case are not "lawful distributors" under the Act. This interpretation of s. 9(1)(c) as an absolute prohibition with a limited exception accords well with the objectives set out in the Broadcasting Act and complements the scheme of the Copyright Act.

The constitutional questions stated in this appeal are not answered because there is no Charter record permitting this Court to address the stated questions. A party cannot rely upon an entirely new argument that

would have required additional evidence to be adduced at trial. "Charter values" cannot inform the interpretation given to s. 9(1)(c) of the Radiocommunication Act, for these [page562] values are to be used as an interpretive principle only in circumstances of genuine ambiguity. A blanket presumption of Charter consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction, and wrongly upset the dialogic balance among the branches of governance. Where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different result.

Cases Cited

Not followed: *R. v. Love* (1997), 117 *Man. R. (2d)* 123; *R. v. Ereiser* (1997), 156 *Sask. R.* 71; *R. v. LeBlanc*, [1997] *N.S.J. No.* 476 (QL); *R. v. Thériault*, [2000] *R.J.Q.* 2736, aff'd Sup. Ct. Drummondville, No. 405-36-000044-003, June 13, 2001; *R. v. Gregory Électronique Inc.*, [2000] Q.J. No. 4923 (QL), aff'd [2001] Q.J. No. 4925 (QL); *R. v. S.D.S. Satellite Inc.*, C.Q. Laval, No. 540-73-000055-980, October 31, 2000; *R. v. Branton* (2001), 53 *O.R. (3d)* 737; referred to: *Canada (Attorney General) v. Mossop*, [1993] 1 *S.C.R.* 554; *R. v. Open Sky Inc.*, [1994] *M.J. No.* 734 (QL), aff'd (1995), 106 *Man. R. (2d)* 37, leave to appeal ref'd (1996), 110 *Man. R. (2d)* 153; *R. v. King*, [1996] *N.B.J. No.* 449 (QL), rev'd (1997), 187 *N.B.R. (2d)* 185; *R. v. Knibb* (1997), 198 *A.R.* 161, aff'd [1998] *A.J. No.* 628 (QL); *ExpressVu Inc. v. Nil Norsat International Inc.*, [1998] 1 *F.C.* 245, aff'd (1997), 222 *N.R.* 213; *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 272 *A.R.* 201, 2000 *ABQB* 628; *Canada (Procureure générale) v. Pearlman*, [2001] *R.J.Q.* 2026; *Ryan v. 361779 Alberta Ltd.* (1997), 208 *A.R.* 396; *R. v. Scullion*, [2001] *R.J.Q.* 2018; *Stuart Investments Ltd. v. The Queen*, [1984] 1 *S.C.R.* 536; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 *S.C.R.* 3; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 *S.C.R.* 27; *R. v. Gladue*, [1999] 1 *S.C.R.* 688; *R. v. Araujo*, [2000] 2 *S.C.R.* 992, 2000 *SCC* 65; *R. v. Sharpe*, [2001] 1 *S.C.R.* 45, 2001 *SCC* 2; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 *S.C.R.* 84, 2002 *SCC* 3; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 *S.C.R.* 867, 2001 *SCC* 56; *Stoddard v. Watson*, [1993] 2 *S.C.R.* 1069; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 *S.C.R.* 1015; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 *S.C.R.* 108; *R. v. Goulis* (1981), 33 *O.R. (2d)* 55; *R. v. Hasselwander*, [1993] 2 *S.C.R.* 398; *R. v. Russell*, [2001] 2 *S.C.R.* 804, 2001 *SCC* 53; *Westminster Bank Ltd. v. Zang*, [1966] *A.C.* 182; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 *S.C.R.* 743; *Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 *S.C.R.* 831; *Corbiere v. Canada (Minister of Indian [page563] and Northern Affairs)*, [1999] 2 *S.C.R.* 203; *Bisaillon v. Keable*, [1983] 2 *S.C.R.* 60; *Perka v. The Queen*, [1984] 2 *S.C.R.* 232; *Idziak v. Canada (Minister of Justice)*, [1992] 3 *S.C.R.* 631; *R. v. Gayle* (2001), 54 *O.R. (3d)* 36, leave to appeal to S.C.C. refused, [2002] 1 *S.C.R.* vii; *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 *S.C.R.* 1572; *Danson v. Ontario (Attorney General)*, [1990] 2 *S.C.R.* 1086; *Baron v. Canada*, [1993] 1 *S.C.R.* 416; *R. v. Mills*, [1999] 3 *S.C.R.* 668; *Borowski v. Canada (Attorney General)*, [1989] 1 *S.C.R.* 342; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 *S.C.R.* 573; *Cloutier v. Langlois*, [1990] 1 *S.C.R.* 158; *R. v. Salituro*, [1991] 3 *S.C.R.* 654; *R. v. Golden*, [2001] 3 *S.C.R.* 679, 2001 *SCC* 83; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 *S.C.R.* 156, 2002 *SCC* 8; *Hills v. Canada (Attorney General)*, [1988] 1 *S.C.R.* 513; *Slaight Communications Inc. v. Davidson*, [1989] 1 *S.C.R.* 1038; *R. v. Zundel*, [1992] 2 *S.C.R.* 731; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 *S.C.R.* 606; *R. v. Lucas*, [1998] 1 *S.C.R.* 439; *Symes v. Canada*, [1993] 4 *S.C.R.* 695; *Willick v. Willick*, [1994] 3 *S.C.R.* 670; *Vriend v. Alberta*, [1998] 1 *S.C.R.* 493.

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APPEAL from a judgment of the British Columbia Court of Appeal (2000), 191 D.L.R. (4th) 662, 9 W.W.R. 205, 142 B.C.A.C. 230, 233 W.A.C. 230, 79 B.C.L.R. (3d) 250, [2000] B.C.J. No. 1803 (QL), 2000 BCCA 493, dismissing an appeal from a decision of the British Columbia Supreme Court, [1999] B.C.J. No. 3092 (QL), refusing to grant an injunction. Appeal allowed.

K. William McKenzie, Eugene Meehan, Q.C., and Jessica Duncan, for the appellant. Alan D. Gold and Maureen McGuire, for all respondents except Michelle Lee. Graham R. Garton, Q.C., and Christopher Rugar, for the intervener the Attorney General of Canada. Roger T. Hughes, Q.C., for the intervener the Canadian Motion Picture Distributors Association. Christopher D. Bredt, Jeffrey D. Vallis and Davit D. Akman, for the intervener DIRECTV, Inc. Ian W. M. Angus, for the intervener the Canadian Alliance for Freedom of Information and Ideas. Alan Riddell, for the intervener the Congres Iberoamerican du Canada.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

I. Introduction

1 This appeal involves an issue that has divided courts in our country. It concerns the proper interpretation of s. 9(1)(c) of the Radiocommunication [page565] Act, R.S.C. 1985, c. R-2 (as am. by S.C. 1991, c. 11, s. 83). In practical terms, the issue is whether s. 9(1)(c) prohibits the decoding of all encrypted satellite signals, with a limited exception, or whether it bars only the unauthorized decoding of signals that emanate from licensed Canadian distributors.

2 The respondents facilitate what is generally referred to as "grey marketing" of foreign broadcast signals. Although there is much debate -- indeed rhetoric -- about the term, it is not necessary to enter that discussion in these reasons. Rather, the central issue is the much narrower one surrounding the above statutory provision: does s. 9(1)(c) operate on these facts to prohibit the decryption of encrypted signals emanating from U.S. broadcasters? For the reasons that follow, my conclusion is that it does have this effect. Consequently, I would allow the appeal.

1I. Background

3 The appellant is a limited partnership engaged in the distribution of direct-to-home ("DTH") television programming. It is one of two current providers licensed by the Canadian Radio-television and Telecommunications Commission ("CRTC") as a DTH distribution undertaking under the Broadcasting Act, S.C. 1991, c. 11. There are two similar DTH satellite television distributors in the United States, neither of which possesses a CRTC licence. The door has effectively been shut on foreign entry into the regulated Canadian broadcast market since April 1996, when the Governor in Council directed the CRTC not to issue, amend or renew broadcasting licences for non-Canadian applicants (SOR/96-192). The U.S. companies are, however, licensed by their country's Federal Communications Commission to broadcast their signals within that country. The intervener DIRECTV is the larger of these two U.S. companies.

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4 DTH broadcasting makes use of satellite technology to transmit television programming signals to viewers. All DTH broadcasters own or have access to one or more satellites located in geosynchronous orbit, in a fixed position relative to the globe. The satellites are usually separated by a few degrees of Earth longitude, occupying "slots" assigned by international convention to their various countries of affiliation. The DTH broadcasters send their signals from land-based uplink stations to the satellites, which then diffuse the signals over a broad aspect of the Earth's surface, covering an area referred to as a "footprint". The broadcasting range of the satellites is oblivious to international boundaries and often extends over the territory of multiple countries. Any person who is somewhere within the footprint and equipped with the proper reception devices (typically, a small satellite reception dish antenna, amplifier, and receiver) can receive the signal.

5 The appellant makes use of satellites owned and operated by Telesat Canada, a Canadian company. Moreover, like every other DTH broadcaster in Canada and the U.S., the appellant encrypts its signals to control reception. To decode or unscramble the appellant's signals so as to permit intelligible viewing, customers must possess an additional decoding system that is specific to the appellant: the decoding systems used by other DTH broadcasters are not cross-compatible and cannot be used to decode the appellant's signals. The operational component of the decoding system is a computerized "smart card" that bears a unique code and is remotely accessible by the appellant. Through this device, once a customer has chosen and subscribed to a programming package, and rendered the appropriate fee, the appellant can communicate to the decoder that the customer is

21 This appeal raises three issues:

1. Does s. 9(1)(c) of the Radiocommunication Act create an absolute prohibition against decoding, followed by a limited exception, or does it allow all decoding, except for those signals for which there is a lawful distributor who has not granted its authorization?
2. Is s. 9(1)(c) of the Radiocommunication Act inconsistent with s. 2(b) of the Canadian Charter of Rights and Freedoms?
3. If the answer to the above question is "yes", can the statutory provision be justified pursuant to s. 1 of the Charter?

[page578]

1I. Analysis

1. Introduction

22 It is no exaggeration to state that s. 9(1)(c) of the federal Radiocommunication Act has received inconsistent application in the courts of this country. On one hand, there is a series of cases interpreting the provision (or suggesting that it might be interpreted) so as to create an absolute prohibition, with a limited exception where authorization from a lawful Canadian distributor is received: *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (QL) (Prov. Ct.), at para. 36, aff'd (1995), 106 Man. R. (2d) 37 (Q.B.) (sub nom. *R. v. O'Connor*), at para. 10, leave to appeal refused on other grounds (1996), 110 Man. R. (2d) 153 (C.A.); *R. v. King*, [1996] N.B.J. No. 449 (QL) (Q.B.), at paras. 19-20, rev'd on other grounds (1997), 187 N.B.R. (2d) 185 (C.A.) (sub nom. *King v. Canada* (Attorney General)); *R. v. Knibb* (1997), 198 A.R. 161 (Prov. Ct.), aff'd [1998] A.J. No. 628 (QL) (Q.B.) (sub nom. *R. v. Quality Electronics (Taber) Ltd.*); *ExpressVu Inc. v. Nil Norsat International Inc.*, [1998] 1 F.C. 245 (T.D.), aff'd (1997), 222 N.R. 213 (F.C.A.); *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628, at para. 72; *Canada (Procureure générale) v. Pearlman*, [2001] R.J.Q. 2026 (C.Q.), at p. 2034.

23 On the other hand, there are a number of conflicting cases that have adopted the more restrictive interpretation favoured by the majority of the Court of Appeal for British Columbia in the case at bar: *R. v. Love* (1997), 117 Man. R. (2d) 123 (Q.B.); *R. v. Ereiser* (1997), 156 Sask. R. 71 (Q.B.); *R. v. LeBlanc*, [1997] N.S.J. No. 476 (QL) (S.C.); *Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396 (Prov. Ct.), at para. 12; *R. v. Thériault*, [2000] R.J.Q. 2736 (C.Q.), aff'd Sup. Ct. Drummondville, No. 405-36-000044-003, June 13, 2001 (sub nom. *R. v. D'Argy*); *R. v. Gregory Électronique Inc.*, [2000] Q.J. No. 4923 (QL) (C.Q.), aff'd [2001] Q.J. No. 4925 (QL) (Sup. Ct.); *R. v. S.D.S. Satellite Inc.*, C.Q. Laval, No. 540-73-000055-980, October 31, 2000; *R. v. [page579] Scullion*, [2001] R.J.Q. 2018 (C.Q.); *R. v. Branton* (2001), 53 O.R. (3d) 737 (C.A.).

24 As can be seen, the schism is not explained simply by the adoption of different approaches in different jurisdictions. Although the highest courts in British Columbia and Ontario have now produced decisions that bind the lower courts in those provinces to the restrictive interpretation, and although the Federal Court of Appeal has similarly bound the Trial Division courts under it to the contrary interpretation, the trial courts in Alberta, Manitoba, and Quebec have produced irreconcilable decisions. Those provinces remain without an authoritative determination on the matter. This appeal, therefore, places this Court in a position to harmonize the interpretive dissonance that is echoing throughout Canada.

25 In attempting to steer its way through this maze of cases, the Court of Appeal for British Columbia, in my respectful view, erred in its interpretation of s. 9(1)(c). In my view, there are five aspects of the majority's decision that warrant discussion. First, it commenced analysis from the belief that an ambiguity existed. Second, it placed undue emphasis on the sheer number of judges who had disagreed as to the proper interpretation of s. 9(1)(c). Third, it did not direct sufficient attention to the context of the Radiocommunication Act within the regulatory

régime for broadcasting in Canada, and did not consider the objectives of that régime, feeling that it was unnecessary to address these "wider policy issues". Fourth, the majority did not read s. 9(1)(c) grammatically in accordance with its structure, namely, a prohibition with a limited exception. Finally, the majority of the court effectively inverted the words of the provision, such that the signals for which a lawful distributor could provide authorization to decode (i.e., the exception) defined the very scope of the prohibition.

[page580]

B. Does Section 9(1)(c) of the Radiocommunication Act Create an Absolute Prohibition Against Decoding, Followed by a Limited Exception, or Does it Allow all Decoding, Except for Those Signals for Which There Is a Lawful Distributor who Has not Granted its Authorization?

(1) Principles of Statutory Interpretation

26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like [page581] people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

28 Other principles of interpretation -- such as the strict construction of penal statutes and the "Charter values" presumption -- only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, per Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the "Charter values" principle later in these reasons.)

29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, supra, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major

J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to [page582] which I would add, "including other principles of interpretation".

30 For this reason, ambiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, *supra*, at pp. 4-5).

(2) Application to this Case

31 The interpretive factors laid out by Driedger need not be canvassed separately in every case, and in any event are closely related and interdependent (Chieu, *supra*, at para. 28). In the context of the present appeal, I will group my discussion under two broad headings. Before commencing my analysis, however, I wish to highlight a number of issues on these facts. First, there is no dispute surrounding the fact that the signals of the U.S. DTH broadcasters are "encrypted" under the meaning of the Act, nor is there any dispute regarding the fact that the U.S. broadcasters are not "lawful distributors" under the Act. Secondly, all of the DTH broadcasters in Canada and the U.S. require a person to pay "a subscription fee or other charge" for unscrambled reception. Finally, I note that the "encrypted network feed" portion of s. 9(1)(c) is not relevant on these facts and can be ignored for the purposes of analysis.

[page583]

(a) Grammatical and Ordinary Sense

32 In its basic form, s. 9(1)(c) is structured as a prohibition with a limited exception. Again, with the relevant portions emphasized, it states that:

No person shall

...

(c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;

Il est interdit :

...

c) de décoder, sans l'autorisation de leur distributeur légitime ou en contravention avec celle-ci, un signal d'abonnement ou une alimentation réseau; [Emphasis added.]

The provision opens with the announcement of a broad prohibition ("No person shall"), follows by announcing the nature ("decode") and object ("an encrypted subscription programming signal") of the prohibition, and then announces an exception to it ("otherwise than under and in accordance with an authorization from the lawful

Carrières Ste-Thérèse Ltée, [1985] 1 S.C.R. 831, at p. 838). Parliament has provided express direction to this effect through its enactment of s. 10 of the Interpretation Act, which states in part that "[t]he law shall be considered as always speaking". In any event, "or elsewhere" ("ou ailleurs", in French) suggests a much broader ambit than the particular and limited examples in s. 3(3), and I would be reticent to equate the two.

38 In my opinion, therefore, the definition of "subscription programming signal" encompasses signals originating from foreign distributors and intended for reception by a foreign public. Again, because the Radiocommunication Act does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(e), which forbids their [page586] unauthorized retransmission within Canada) and only concerns decrypting that occurs in the s. 3(3) locations, this does not give rise to any extra-territorial exercise of authority. At this stage, what this means is that, contrary to the holdings of the chambers judge and the majority of the Court of Appeal in the instant case, Parliament did in fact choose language in s. 9(1)(c) that prohibits the decoding of all encrypted subscription signals, regardless of their origin, "otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed". I shall now consider this exception.

39 The Court of Appeal relied upon the definite article found in this portion of s. 9(1)(c) ("the signal"), in order to support its narrower reading of the provision. Before this Court, counsel for the respondents submitted as well that the definite article preceding the words "lawful distributor" confirms that the provision "is only intended to operate where there is a lawful distributor". Finally, the respondents draw to our attention the French language version of the provision, and particularly the word "leur" that modifies "distributeur légitime": a number of cases considering the French version of s. 9(1)(c) have relied upon that word to arrive at the narrower interpretation (see the Court of Quebec judgments in Thériault, supra, at p. 2739; Gregory Électronique, supra, at paras. 24-26; and S.D.S. Satellite, supra, at p. 7. See also Branton, supra, at para. 25).

40 I do not agree with these opinions. The definite article "the" and the possessive adjective "leur" merely identify the party who can authorize the decoding in accordance with the exception (see Pearlman, supra, at p. 2032). Thus, while I agree with the majority of the Court of Appeal that "[i]f there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding", I cannot see how it necessarily follows that decoding unregulated signals "cannot therefore be in breach of the Radiocommunication Act" (par. 36). Such an [page587] approach would require one to read words from the exception into the prohibition, which is circular and incorrect. Again, as Provost C.Q.J. stated in Pearlman, supra, at p. 2031: [TRANSLATION] "To seek the meaning of the exception at the outset, and thereafter to define the rule by reference to the exception, is likely to distort the meaning of the text and misrepresent the intention of its author."

41 In my view, the definite articles are used in the exception portion of s. 9(1)(c) in order to identify from amongst the genus of signals captured by the prohibition (any encrypted subscription programming signal) that species of signals for which the rule is "otherwise". Grammatically, then, the choice of definite and indefinite articles essentially plays out into the following rendition: No person shall decode any (indefinite) encrypted subscription programming signal unless, for the (definite) particular signal that is decoded, the person has received authorization from the (definite) lawful distributor. Thus, as might happen, if no lawful distributor exists to grant such authorization, the general prohibition must remain in effect.

42 Although I have already stated that the U.S. DTH distributors in the present case are not "lawful distributors" under the Act, I should discuss this term, because it is important to the interpretive process. Section 2 provides that a "lawful distributor" of an encrypted subscription programming signal is "a person who has the lawful right in Canada to transmit it and authorize its decoding". In this connection, the fact that a person is authorized to transmit programming in another country does not, by that fact alone, qualify as granting the lawful right to do so in Canada. Moreover, the phrase "lawful right" ("légitime autorisée") comprehends factors in addition to licences granted by the CRTC. In defining "lawful distributor", Parliament could have made specific reference to a person holding a CRTC licence (as it did in s. 18(1)(c)) or a Minister's licence (s. 5(1)(a)). Instead, it deliberately chose broader language. I therefore agree with the opinion [page588] of Létourneau J.A. in the Federal Court of Appeal decision in Norsat, supra, at para. 4, that

[t]he concept of "lawful right" refers to the person who possesses the regulatory rights through proper licensing under the Act, the authorization of the Canadian Radio-television and Telecommunications Commission as well as the contractual and copyrights necessarily pertaining to the content involved in the transmission of the encrypted subscription programming signal or encrypted network feed.

As pointed out by the Attorney General of Canada, this interpretation means that even where the transmission of subscription programming signals falls outside of the definition of "broadcasting" under the Broadcasting Act (i.e., where the transmitted programming is "made solely for performance or display in a public place") and no broadcasting licence is therefore required, additional factors must still be considered before it can be determined whether the transmitter of the signals is a "lawful distributor" for the purposes of the Radiocommunication Act.

43 In the end, I conclude that when the words of s. 9(1)(c) are read in their grammatical and ordinary sense, taking into account the definitions provided in s. 2, the provision prohibits the decoding in Canada of any encrypted subscription programming signal, regardless of the signal's origin, unless authorization is received from the person holding the necessary lawful rights under Canadian law.

(b) Broader Context

44 Although the Radiocommunication Act is not, unfortunately, equipped with its own statement of purpose, it does not exist in a vacuum. The Act's focus is upon the allocation of specified radio frequencies, the authorization to possess and operate radio apparatuses, and the technical regulation of the radio spectrum. The Act also places restrictions on the reception of and interference with [page589] radiocommunication, which includes encrypted broadcast programming signals of the sort at issue. S. Handa et al., *Communications Law in Canada* (loose-leaf), at p. 3.8, describe the Radiocommunication Act as one "of the three statutory pillars governing carriage in Canada". These same authors note at p. 3.17 that:

The Radiocommunication Act embraces all private and public use of the radio spectrum. The close relationship between this and the telecommunications and broadcasting Acts is determined by the fact that telecommunications and broadcasting are the two principal users of the radioelectric spectrum.

45 The Broadcasting Act came into force in 1991, in an omnibus statute that also brought substantial amendments to the Radiocommunication Act, including the addition thereto of s. 9(1)(c). Its purpose, generally, is to regulate and supervise the transmission of programming to the Canadian public. Of note for the present appeal is that the definition of "broadcasting" in the Broadcasting Act captures the encrypted DTH programme transmissions at issue and that DTH broadcasters such as the appellant receive their licences under, and are subject to, that Act. The Broadcasting Act also enumerates 20 broad objectives of the broadcasting policy for Canada (in s. 3(1)(a) through (t)). The emphasis of the Act, however, is placed on broadcasting and not reception.

46 Ultimately, the Acts operate in tandem. On this point, I agree with the following passage from the judgment of LeGrandeur Prov. Ct. J. in Knibb, *supra*, at paras. 38-39, which was adopted by Gibson J. in the Federal Court, Trial Division decision in Norsat, *supra*, at para. 35:

The Broadcasting Act and the Radiocommunication Act must be seen as operating together as part of a single regulatory scheme. The provisions of each statute must accordingly be read in the context of the other and [page590] consideration must be given to each statute's roll [sic] in the overall scheme. [Cite to R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 286.]

The addition of s. 9(1)(c), (d) and (e) and other sections to the Radiocommunication Act through the provisions of the Broadcasting Act, 1991 are supportive of that approach in my view. Subsections 9(1)(c), (d) and (e) of the Radiocommunication Act must be seen as part of the mechanism by which the stated policy of regulation of broadcasting in Canada is to be fulfilled.

47 Canada's broadcasting policy has a number of distinguishing features, and evinces a decidedly cultural orientation. It declares that the radio frequencies in Canada are public property, that Canadian ownership and control of the broadcasting system should be a base premise, and that the programming offered through the broadcasting system is "a public service essential to the maintenance and enhancement of national identity and cultural sovereignty". Sections 3(1)(d) and 3(1)(t) enumerate a number of specific developmental goals for, respectively, the broadcasting system as a whole and for distribution undertakings (including DTH distribution undertakings) in particular. Finally, s. 3(2) declares that "the Canadian broadcasting system constitutes a single system" best regulated and supervised "by a single independent public authority".

48 In this context, one finds little support for the restrictive interpretation of s. 9(1)(c). Indeed, as counsel for the Attorney General of Canada argued before us, after consideration of the Canadian broadcasting policy Parliament has chosen to adopt, one may legitimately wonder

why would Parliament enact a provision like the restrictive interpretation? Why would Parliament provide for Canadian ownership, Canadian production, Canadian content in its broadcasting and then simply leave the door open for unregulated, foreign broadcasting to come [page591] in and sweep all of that aside? What purpose would have been served?

49 On the other hand, the interpretation of s. 9(1)(c) that I have determined to result from the grammatical and ordinary sense of the provision accords well with the objectives set out in the Broadcasting Act. The fact that DTH broadcasters encrypt their signals, making it possible to concentrate regulatory efforts on the reception/decryption side of the equation, actually assists with attempts to pursue the statutory broadcasting policy objectives and to regulate and supervise the Canadian broadcasting system as a single system. It makes sense in these circumstances that Parliament would seek to encourage broadcasters to go through the regulatory process by providing that they could only grant authorization to have their signal decoded, and thereby collect their subscription fees, after regulatory approval has been granted.

50 There is another contextual factor that, while not in any way determinative, is confirmatory of the interpretation of s. 9(1)(c) as an absolute prohibition with a limited exception. As I have noted above, the concept of "lawful right" in the definition of "lawful distributor" incorporates contractual and copyright issues. According to the evidence in the present record, the commercial agreements between the appellant and its various programme suppliers require the appellant to respect the rights that these suppliers are granted by the persons holding the copyright in the programming content. The rights so acquired by the programme suppliers permit the programmes to be broadcast in specific locations, being all or part of Canada. As such, the appellant would have no lawful right to authorize decoding of its programming signals in an area not included in its geographically limited contractual right to exhibit the programming.

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51 In this way, the person holding the copyright in the programming can conclude separate licensing deals in different regions, or in different countries (e.g., Canada and the U.S.). Indeed, these arrangements appear typical of the industry: in the present appeal, the U.S. DTH broadcaster DIRECTV has advocated the same interpretation of s. 9(1)(c) as the appellant, in part because of the potential liability it faces towards both U.S. copyright holders and Canadian licencees due to the fact that its programming signals spill across the border and are being decoded in Canada.

52 I also believe that the reading of s. 9(1)(c) as an absolute prohibition with a limited exception complements the scheme of the Copyright Act. Sections 21(1)(c) and 21(1)(d) of the Copyright Act provide broadcasters with a copyright in the communication signals they transmit, granting them the sole right of retransmission (subject to the exceptions in s. 31(2)) and, in the case of a television communication signal, of performing it on payment of a fee. By reading s. 9(1)(c) as an absolute prohibition against decoding except where authorization is granted by the person with the lawful right to transmit and authorize decoding of the signal, the provision extends protection to

the holders of the copyright in the programming itself, since it would proscribe the unauthorized reception of signals that violate copyright, even where no retransmission or reproduction occurs: see F. P. Eliadis and S. C. McCormack, "Vanquishing Wizards, Pirates and Musketeers: The Regulation of Encrypted Satellite TV Signals" (1993), 3 M.C.L.R. 211, at pp. 213-18. Finally, I note that the civil remedies provided for in ss. 18(1)(a) and 18(6) of the Radiocommunication Act both illustrate that copyright concerns are of relevance to the scheme of the Act, thus supporting the finding that there is a connection between these two statutes.

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(c) Section 9(1)(c) as a "Quasi-Criminal" Provision

53 I wish to comment regarding the respondents' argument regarding the penal effects that the "absolute prohibition" interpretation would bring to bear. Although the present case only arises in the context of a civil remedy the appellant is seeking under s. 18(1) of the Act (as a person who "has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(c)") and does not therefore directly engage the penal aspects of the Radiocommunication Act, the respondents direct our attention to ss. 10(1)(b) and 10(2.1). These provisions, respectively, create summary conviction offences for every person providing equipment for the purposes of contravening s. 9 and for every person who in fact contravenes s. 9(1)(c). Respondents' counsel argued before us that, if s. 9(1)(c) is interpreted in the manner suggested by the appellant, "hundreds of thousands of Canadians can expect a knock on their door, because they will be in breach of the statute" and that "the effect of [the appellant's] submissions is to criminalize subscribers even if they pay every cent to which DIRECTV is entitled". The thrust of the respondents' submission is that the presence of ss. 10(1)(b) and 10(2.1) in the Radiocommunication Act provides context that is important to the interpretation of s. 9(1)(c), and that this context militates in favour of the respondents' position.

54 Section 9(1)(c) does have a "dual aspect", in so far as it gives rise to both civil and criminal penalties. I am not, however, persuaded that this plays an important role in the interpretive process here. In any event, I do not think it correct to insinuate that the decision in this appeal will have the effect of automatically branding every Canadian resident who subscribes to and pays for U.S. DTH broadcasting services as a criminal. The penal offence in s. 10(1)(b) requires that circumstances "give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9" [page594] (emphasis added), and allows for a "lawful excuse" defence. Section 10(2.5) further provides that "[n]o person shall be convicted of an offence under paragraph 9(1)(c) ... if the person exercised all due diligence to prevent the commission of the offence". Since it is neither necessary nor appropriate to pursue the meaning of these provisions absent the proper factual context, I refrain from doing so.

(d) Conclusion

55 After considering the entire context of s. 9(1)(c), and after reading its words in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, I find no ambiguity. Rather, I can conclude only that Parliament intended to create an absolute bar on Canadian residents decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization. There is no need in this circumstance to resort to any of the subsidiary principles of statutory interpretation.

C. The Constitutional Questions

56 As I will discuss, I do not propose to answer the constitutional questions that have been stated in this appeal.

57 Rule 32 of the Rules of the Supreme Court of Canada, *SOR/83-74*, mandates that constitutional questions be

stated in every appeal in which the constitutional validity or applicability of legislation is challenged, and sets out the procedural requirements to that end. As recognized by this Court, the purpose of Rule 32 is to ensure that the Attorney General of Canada, the attorneys general of the provinces, and the ministers of justice of the territories are alerted to constitutional challenges, in order that they may decide whether or not to [page595] intervene: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 49, per L'Heureux-Dubé J.; see also B. A. Crane and H. S. Brown, *Supreme Court of Canada Practice 2000* (1999), at p. 253. Rule 32 also serves to advise the parties and other potential interveners of the constitutional issues before the Court.

58 On the whole, the parties to an appeal are granted "wide latitude" by the Chief Justice or other judge of this Court in formulating the questions to be stated: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 71; *Corbiere*, supra, at para. 48. This wide latitude is especially appropriate in a case like the present, where the motion to state constitutional questions was brought by the respondents: generally, a respondent may advance any argument on appeal that would support the judgment below (*Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 240; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 643-44, per Cory J.). Like many general rules, however, this one is subject to an exception. A respondent, like any other party, cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial: *Perka*, supra; *Idziak*, supra; *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.), at para. 69, leave to appeal refused January 24, 2002, [2002] 1 S.C.R. vii.

59 In like manner, even where constitutional questions are stated under Rule 32, it may ultimately turn out that the factual record on appeal provides an insufficient basis for their resolution. The Court is not obliged in such cases to provide answers: *Bisaillon*, supra; *Crane and Brown*, supra, at p. 254. In fact, there are compelling reasons not to: while we will not deal with abstract questions in the ordinary course, "[t]his policy ... is of particular importance in constitutional matters" (*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, at p. 1580; see also *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099; *Baron v. Canada*, [1993] 1 S.C.R. 416, at p. 452; *R. v. Mills*, [page596] [1999] 3 S.C.R. 668, at para. 38, per McLachlin and Iacobucci JJ.). Thus, as Sopinka J. stated for the Court in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 357: "The procedural requirements of Rule 32 of the Supreme Court Rules are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record" (emphasis added).

60 Respondents' counsel properly conceded during oral argument that there is no Charter record permitting this Court to address the stated questions. Rather, he argued that "Charter values" must inform the interpretation given to the Radiocommunication Act. This submission, inasmuch as it is presented as a stand alone proposition, must be rejected. Although I have already set out the preferred approach to statutory interpretation above, the manner in which the respondents would have this Court consider and apply the Charter warrants additional attention at this stage.

61 It has long been accepted that, where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the Charter: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603, per McIntyre J.; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 86, per Iacobucci and Arbour JJ.; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8, at paras. 18-19. One must keep in mind, of course, that the common law is the province of the judiciary: the courts are responsible for its application, and for ensuring that it continues to reflect the basic values of society. The courts do not, however, occupy the same role vis-à-vis statute law.

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62 Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not"

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1. *R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867*

Client/Matter: -None-

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R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867

Supreme Court Reports

Supreme Court of Canada

Present: Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

2001: January 16 / 2001: September 27.

File No.: 27543

[\[2001\] 2 S.C.R. 867](#) | [\[2001\] 2 R.C.S. 867](#) | [\[2001\] S.C.J. No. 55](#) | [\[2001\] A.C.S. no 55](#) | [2001 SCC 56](#)

Her Majesty The Queen, appellant; v. Ulybel Enterprises Limited, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND (54 paras.)

Case Summary

Courts — Jurisdiction — Superior courts — Vessel sold under authority of Federal Court of Canada and proceeds held by court in exercise of its admiralty jurisdiction — Whether provincial superior court can order forfeiture of proceeds of sale of vessel pursuant to s. 72(1) of Fisheries Act, *R.S.C. 1985, c. F-14*.

Fisheries — Forfeiture of proceeds of sale of fishing vessel — Scope of power to order forfeiture of proceeds — Whether continued detention of seized vessel pre-condition to order of forfeiture pursuant to s. 72(1) of Fisheries Act, *R.S.C. 1985, c. F-14*.

The respondent is the registered owner of a Canadian vessel which was observed fishing in the NAFO Convention Area without the required licence or registration card, contrary to the Atlantic Fishery Regulations, 1985. The vessel and its cargo of fish were seized and the Crown took physical possession of the vessel. In 1994 and 1995, actions were commenced in the Federal Court of Canada claiming interests in

the vessel and the court issued arrest orders against the vessel. The respondent was subsequently indicted on charges to be tried before the Newfoundland Supreme Court, Trial Division. Meanwhile, the Crown continued to possess the vessel and was incurring storage and maintenance costs. In 1996, it intervened in one of the Federal Court actions and successfully sought an order allowing the sale of the vessel. The proceeds of the sale were deposited with the Receiver General for the benefit of the Federal Court. In 1997, the respondent was convicted of [page868] the charges and the sentence included forfeiture of \$50,000 of the proceeds of the sale of the vessel. The Newfoundland Court of Appeal upheld the conviction and held that the sentence was not excessive. The court held, however, that the Supreme Court, Trial Division had no jurisdiction or authority to order the forfeiture of the proceeds of sale and it overturned the order of forfeiture, holding that physical detention of a thing seized under the Fisheries Act is a necessary precondition to an order of forfeiture.

Held: The appeal should be allowed and the order of forfeiture made by the Newfoundland Supreme Court, Trial Division restored.

A provincial superior court can order forfeiture of the proceeds of sale of a vessel pursuant to s. 72(1) of the Fisheries Act even when the vessel has been sold under the authority of the Federal Court and the proceeds are held by that court in the exercise of its admiralty jurisdiction.

In light of the kinds of property subject to seizure under s. 51 of the Fisheries Act, the words in s. 72(1) read in their ordinary and grammatical sense clearly contemplate an order of forfeiture of the proceeds of disposition of a vessel seized under the Act. The legislative history also supports a broader interpretation of s. 72(1). A former version of s. 72(1) limited the scope of the power to order forfeiture of proceeds to the proceeds of a disposition of perishables. In 1991, the limiting language was removed in favour of a general reference to the proceeds of "any thing seized under this Act". There is a presumption that the amendments were made for an intelligible purpose and, in this case, the effect of the 1991 amendment to s. 72(1) was to broaden the scope of the forfeiture provision to include the power to forfeit proceeds of the sale of a vessel. This effect is consistent with the intention of Parliament to increase the flexibility and severity of available penalties for Fisheries Act offences.

The fact that the Fisheries Act preserves the property of an accused person is not fatal to the broader interpretation of the power to order forfeiture. This reflects the [page869] presumption of innocence and the principle that the property of an accused should be preserved until culpability is determined. A person charged with an offence under the Fisheries Act, however, cannot rely on the presumption of innocence to prevent or delay a person with an in rem claim against his property from obtaining a remedy. Similarly, where culpability has been finally determined, the presumption of innocence is spent and nothing in the Act immunizes proceeds of sale realized pursuant to a civil authority from forfeiture. The scheme of the Act is strict enough to preserve the seized property of an accused and flexible enough to preserve the availability of the penalties necessary to achieve the object of the Act.

With respect to the legislative context, had Parliament intended the phrase "any proceeds realized from its disposition" to be limited to proceeds of perishables, it could have done so expressly, as it did in s. 70(3), as well as ss. 72(2) and 72(3). Further, a continued physical detention is not expressly stated as a precondition to an order of forfeiture on the face of s. 72(1) nor is it necessary to infer it as a precondition. The process set out in s. 71(2) by which a security deposit obtains the release of seized property is beneficial to the parties and creditors and should not be discouraged. This process would be less attractive if an order of forfeiture were subject to a pre-condition of continued physical detention. Section 72(1) should thus be interpreted as contemplating the making of an order of forfeiture against a vessel that has been released from seizure and returned on the deposit of security. It follows that s. 72(1) authorizes the forfeiture of things that have been formerly seized but released from seizure. Moreover, it is evident from s. 75 that the Act contemplates the possibility of parallel proceedings, in personam and in rem, involving the same vessel. This lends support to the view that s. 72(1) authorizes the forfeiture of proceeds realized pursuant to an authority other than the Fisheries Act. Lastly, the admiralty provisions of the Federal Court Act and Fisheries Act should be read as a consistent, harmonious scheme for the regulation of maritime matters. Fishing vessels and their use are at the heart of the activities governed by each regime. If the Court of Appeal's narrow

interpretation is adopted, an order for sale emanating from the Federal Court would terminate the jurisdiction of the Newfoundland Supreme Court to order forfeiture. Such a result does not comply with the principle of interpretation that presumes a harmony, [page870] coherence, and consistency between statutes dealing with the same subject matter.

Cases Cited

Referred to: *R. v. Savory* (1992), 108 N.S.R. (2d) 245; *R. v. Corcoran* (1997), 153 Nfld. & P.E.I.R. 318; *R. v. Vautour* (2000), 226 N.B.R. (2d) 226; *R. v. Chute* (1997), 160 N.S.R. (2d) 378; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660; *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405; *Bathurst Paper Ltd. v. Minister of Municipal Affairs of New Brunswick*, [1972] S.C.R. 471.

Statutes and Regulations Cited

Atlantic Fishery Regulations, 1985, *SOR/86-21*, s. 13(1)(a), (b).
Criminal Code, *R.S.C. 1985, c. C-46*, s. 489.1.
Federal Court Act, *R.S.C. 1985, c. F-7*.
Federal Court Rules, C.R.C. 1978, c. 663, rr. 1007, 1008, 1010.
Fisheries Act, *R.S.C. 1985, c. F-14* [am. 1991, c. 1], ss. 50, 51, 70, 71, 71.1, 72, 73.1, 75.

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APPEAL from a judgment of the Newfoundland Court of Appeal (1999), 178 Nfld. & P.E.I.R. 321, 544 A.P.R. 321, [1999] N.J. No. 232 (QL), setting aside an order of forfeiture granted by the Supreme Court, Trial Division (1997), 150 Nfld. & P.E.I.R. 308, 470 A.P.R. 308, [1997] N.J. No. 114 (QL). Appeal allowed.

Graham Garton, Q.C., and Gordon S. Campbell, for the appellant. John R. Sinnott, Q.C., for the respondent.

Solicitor for the appellant: The Deputy Attorney General of Canada, Ottawa. Solicitors for the respondent: Lewis, Sinnott, Shorthall & Hurley, St. John's.

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The judgment of the Court was delivered by

IACOBUCCI J.

1 This appeal raises the question of whether a provincial superior court can order forfeiture of the proceeds of sale of a vessel pursuant to s. 72(1) of the Fisheries Act, *R.S.C. 1985, c. F-14*, as amended by S.C. 1991, c. 1, even when the vessel has been sold under the authority of the Federal Court of Canada and the proceeds are held by that court in the exercise of its admiralty jurisdiction.

I. Background

II. The Vessel and its Seizure

2 The "Kristina Logos" (the "vessel") is a factory freezer trawler built in 1976 and registered in Canada in 1981. On February 3, 1992, José Pratas purchased the vessel from Pêches Nordiques Inc., formerly Kosmos P/F Fishery Canada Ltd., by way of bill of sale. On the same day that he purchased the vessel, Mr. Pratas registered three documents with the Canadian Registry of Shipping: the bill of sale by which ownership of the vessel was transferred to him, a mortgage he had executed in favour of Pêches Nordiques Inc. (later transferred to Hillsdown International Ltd. and ultimately to Clearwater Atlantic Seafoods Inc.), and a declaration of ownership stating he was entitled to be registered as owner.

3 On October 16, 1992, Mr. Pratas sold the vessel to Ulybel Enterprises Limited (the "respondent"). The respondent was incorporated in Nova Scotia on November 22, 1989, and Mr. Pratas was its sole director and shareholder. On December 9, 1992, the bill of sale by which ownership of the vessel was transferred to the respondent, and a declaration of ownership stating that the respondent was qualified to own a Canadian ship were filed with the Canadian Registry of Shipping. At the same time, the Registry was informed that Mr. Pratas was appointed manager. Therefore, at all material times, the vessel was a Canadian vessel, of which [page872] the respondent was the registered owner, subject to a registered mortgage.

4 In 1993, the respondent entered into a Bareboat Charter with a Portuguese company named Marqueirapesca Lda. The shareholders of that company are Mr. Pratas owning 51 percent of the outstanding shares, and Carlos and Mario Neves (the "Neves Brothers") owning 49 percent. It was not contested that in 1993 and 1994 Marqueirapesca Lda. fished the vessel off the coast of Newfoundland and in the NAFO Convention Area, divisions 3M, 3N and 3O.

5 NAFO is an international body implemented to optimize the utilization, management and conservation of the Northwest Atlantic fisheries stocks in a quadrant of ocean and coastal waters with a Northern border extending from the Hudson Strait below Baffin Island to Greenland and a Western border extending from Baffin Island to Northern North Carolina. Divisions 3M, 3N and 3O fall south and west of Newfoundland. Significant parts of the Grand Banks are within two of these divisions.

6 On April 2, 1994, the vessel was observed fishing in the NAFO Convention Area without the required licence or registration card and in contravention of ss. 13(1)(a) and 13(1)(b) of the Atlantic Fishery Regulations, 1985, *SOR/86-21* (the "Regulations"). The vessel and its cargo of fish were seized by officials of the Department of Fisheries and Oceans pursuant to s. 51 of the Fisheries Act and escorted to St. John's, Newfoundland. The Crown in Right of Canada thereby took physical possession of the vessel.

B. The Litigation: One Vessel but Two Courts

7 On April 4 and 5, 1994, two informations were sworn charging the respondent with two counts of permitting the

forfeiture after reviewing the powers to seize, retain custody of and detain property in ss. 51, 70 and 71. The Court of Appeal at para. 34 determined that:

Following a seizure, there are two possibilities: the vessel or other object seized will be detained by the fishery officer or his agent; or, it will be returned to the owner, at which time the seizure will be at an end.

But the Court of Appeal's analysis in this regard did not, with respect, go far enough. First, the Court of Appeal did not deal with the fact that property could be released from seizure, but not returned to the owner for being subject to an arrest order or an order for sale made under the authority of another court. This is significant since, as noted above, the Fisheries Act was amended in 1991 to remove the limitation that only those proceeds realized by a disposition under the Fisheries Act are subject to forfeiture. Second, the Court of Appeal did not consider the effect of a continued physical detention precondition on the process by which a vessel may be returned to its owner upon the deposit of security under s. 71(2).

46 Under s. 71(2) of the Fisheries Act, the process by which a security deposit obtains the release of seized property is a kind of bailment. Section 71(2) [page893] provides that, if security is given to Her Majesty in a form and amount satisfactory to the Minister, the court has a discretionary power to order that the seized property be returned to the person from whom it was seized. In the result, a contract is formed between the Crown and the person seeking the return of the property whereby the person pledges something of value, usually money in an amount equal to or exceeding the market value of the seized property, in order to assure the performance of an obligation by furnishing a resource to be used in case of failure in the principal obligation. This arrangement is mutually beneficial since the person from whom the property was seized is able to reacquire the property and put it to good use, while the Crown need not incur expenses for the storage and maintenance of seized property. In this way, both parties, as well as any creditors, are protected from the diminution of equity that can occur when storage costs accumulate while property is detained. There are, therefore, sound and compelling reasons to interpret this legislation in a way that will harmonize the interests of the accused, the Crown, the employees and creditors that have an interest in getting productive, income-earning property back into circulation. Given the potential for a lengthy period of pre-trial detention, the benefits to be obtained by the return of property on the deposit of security are significant and recourse to this process should not be discouraged.

47 However, for the reasons that follow, recourse to this process would be less attractive if an order of forfeiture were subject to a precondition of continued physical detention. There appears to be no power under the Act to order the forfeiture of a security deposit, only the vessel or other property for which it is exchanged. The right to claim the security deposit is contractual and arises out of the failure of the person to whom the property was returned to perform the obligations undertaken upon the return of seized property. The parties ought to be free to include in such a contract, an obligation to deliver-up the vessel if an order of forfeiture is made against it. There is nothing in the Act to indicate an intention to constrain the parties from contracting in this way.

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48 Furthermore, if continued physical detention were a precondition to an order of forfeiture, to preserve the availability of the penalty of forfeiture, either the Crown would have to refuse to accept a security deposit, or the court would have to exercise its discretion and refuse to order the return of the property. There is nothing in the Fisheries Act to indicate that the interim, interlocutory measure of the return of property on the deposit of security should trump or foreclose the remedy of forfeiture. Such an interpretation is inconsistent with the mutual benefits available under this process, the harmonization of the interests of the parties and innocent third parties, the intention of Parliament to increase the severity and flexibility of penalties under the Fisheries Act, and the deterrent effect of the power of forfeiture. Taking all of this into consideration, I believe it follows that s. 72(1) contemplates the making of an order of forfeiture against a vessel that has been released from seizure and returned on the deposit of security. It also follows that when s. 72(1) authorizes the forfeiture of "any thing seized under this Act", that includes things that have been formerly seized under the Fisheries Act, but released from seizure.

(c) Relief from Forfeiture

49 In addition, the Court of Appeal did not consider the implications of s. 75 of the Fisheries Act. Section 75 permits innocent parties with an interest against property to apply to a provincial superior court for an order that their interest is not affected by the forfeiture and declaring the extent of their interest. It is open to an innocent party to assert its interest in the form of an in rem claim against a vessel in the Federal Court, under its admiralty jurisdiction. Notwithstanding the respondent's argument that the courts in Newfoundland have retained their admiralty jurisdiction intact, such a course of action is natural, especially in jurisdictions where the superior courts' admiralty jurisdiction has been ceded to the Federal Court of Canada. Indeed, it would be perverse to force a litigant claiming an in rem interest in a seized vessel to wait for an order of forfeiture under the Fisheries Act in order to have the extent of its interest determined by a court of admiralty jurisdiction. [page895] Thus, it is evident from s. 75 that the Fisheries Act does contemplate the possibility of parallel proceedings, in personam and in rem, involving the same vessel. This lends further support to the view that s. 72(1) authorizes the forfeiture of proceeds realized pursuant to an authority other than the Fisheries Act.

(d) Harmonization of Statutes

50 As noted above, because of the interaction in this case between the in personam jurisdiction of the Newfoundland Supreme Court under the Fisheries Act and the in rem jurisdiction of the Federal Court under the admiralty provisions of the Federal Court Act, in considering the "entire context" of s. 72(1) and the intent of Parliament, it is important to apply the principles for harmonizing different statutes in this case.

51 The admiralty provisions of the Federal Court Act and the provisions of the Fisheries Act can and should be read as a consistent, harmonious scheme for the regulation of maritime matters. Fishing vessels and their use are at the heart of the activities governed by each regime, and the law in one area will inevitably exert an influence on the law in the other. For example, it is a likely scenario that many fishing vessels are mortgaged and must be active and producing income in order to discharge the mortgage. A seizure of such a vessel under the Fisheries Act can result in a lengthy pre-trial detention. If an owner is unable to obtain the return of the vessel by posting security, by taking the vessel out of the working ocean, it is likely that a period of detention that curtailed the income producing activities of the vessel would precipitate a civil claim against the vessel in a court of admiralty jurisdiction such as the Federal Court of Canada. Therefore, a reasonable and obvious explanation of the 1991 amendments to s. 72(1) is that the above scenario was anticipated by the legislators, who, in order to preserve the jurisdiction of the courts to impose forfeiture as a penalty, broadened the power to make an order of forfeiture to include in its scope the proceeds of a disposition [page896] of a seized vessel realized under an authority other than the Fisheries Act, thus giving effect to Parliament's intention to increase penalties for fisheries offences while also preserving the operation of the presumption of innocence vis-à-vis the quasi-criminal processes of the Fisheries Act.

52 If the Court of Appeal's narrow interpretation of s. 72(1) is adopted, an order for sale emanating from the Federal Court would terminate the jurisdiction of the Newfoundland Supreme Court to order forfeiture. As between the Fisheries Act and the grant of admiralty jurisdiction in the Federal Court Act, such a result does not comply with the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter.

1. Conclusion

53 Considering the various issues in this appeal, the jurisdictional questions they raise, and the reconciliation of jurisdictions in rem and in personam, criminal and commercial, maritime and penal, and Federal Court and provincial court, I conclude that s. 72(1) does authorize the sentencing court to make an order of forfeiture against the proceeds of disposition of a vessel formerly seized under the Fisheries Act, but sold under the jurisdiction of the Federal Court of Canada. The sale of the vessel was contemplated, but not effected, under the Fisheries Act.

Furthermore, the Crown in this case did not institute proceedings in the Federal Court, and its application to intervene and motion for an order for sale were not an end run around limitations in the Fisheries Act.

54 For the foregoing reasons, I would allow the appeal, set aside the order of the Court of Appeal, [page897] and restore the order of forfeiture made by the sentencing judge.

End of Document

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**IN THE MATTER OF the *Broadcasting Act*,
S.C. 1991, c. 11;**

**AND IN THE MATTER OF the Canadian
Radio-television and Telecommunications
Commission's Broadcasting Regulatory
Policy CRTC 2010-167 and Broadcasting
Order CRTC 2010-168;**

**AND IN THE MATTER OF an application
by way of a reference to the Federal Court of
Appeal pursuant to ss. 18.3(1) and 28(2) of the
Federal Courts Act, R.S.C. 1985, c. F-7.**

**Cogeco Cable Inc., Rogers Communications
Inc., TELUS Communications Company and
Shaw Communications Inc. *Appellants***

v.

**Bell Media Inc. (formerly CTV Globemedia
Inc.), V Interactions Inc., Newfoundland
Broadcasting Co. Ltd. and Canwest Television
Limited Partnership *Respondents***

and

**Canadian Radio-television
and Telecommunications
Commission *Intervener***

**INDEXED AS: REFERENCE RE BROADCASTING
REGULATORY POLICY CRTC 2010-167 AND
BROADCASTING ORDER CRTC 2010-168**

2012 SCC 68

File No.: 34231.

2012: April 17; 2012: December 13.

Present: McLachlin C.J. and LeBel, Deschamps,
Fish, Abella, Rothstein, Cromwell, Moldaver and
Karakatsanis JJ.

**DANS L'AFFAIRE intéressant la *Loi sur la
radiodiffusion*, L.C. 1991, ch. 11;**

**ET DANS L'AFFAIRE DE la Politique
réglementaire de radiodiffusion CRTC
2010-167 du Conseil de la radiodiffusion
et des télécommunications canadiennes
et l'ordonnance de radiodiffusion CRTC
2010-168;**

**ET DANS L'AFFAIRE D'UNE demande
introduite sous forme de renvoi à la Cour
d'appel fédérale en vertu des par. 18.3(1) et
28(2) de la *Loi sur les Cours fédérales*, L.R.C.
1985, ch. F-7.**

**Cogeco Câble Inc., Rogers Communications
Inc., TELUS Communications Company et
Shaw Communications Inc. *Appelantes***

c.

**Bell Media Inc. (auparavant CTV Globemedia
Inc.), V Interactions Inc., Newfoundland
Broadcasting Co. Ltd. et Canwest Television
Limited Partnership *Intimées***

et

**Conseil de la radiodiffusion et
des télécommunications
canadiennes *Intervenant***

**RÉPERTORIÉ : RENOI RELATIF À LA POLITIQUE
RÉGLEMENTAIRE DE RADIODIFFUSION CRTC
2010-167 ET L'ORDONNANCE DE RADIODIFFUSION
CRTC 2010-168**

2012 CSC 68

N° du greffe : 34231.

2012 : 17 avril; 2012 : 13 décembre.

Présents : La juge en chef McLachlin et les juges
LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell,
Moldaver et Karakatsanis.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Communications law — Broadcasting — Canadian Radio-television and Telecommunications Commission (“CRTC”) adopting policy establishing market-based value for signal regulatory regime — Policy empowering private local television stations (“broadcasters”) to negotiate direct compensation for retransmission of signals by cable and satellite companies (“broadcasting distribution undertakings” or “BDUs”), as well as right to prohibit BDUs from retransmitting those signals if negotiations unsuccessful — Whether CRTC having jurisdiction under Broadcasting Act to implement proposed regime — Broadcasting Act, S.C. 1991, c. 11, ss. 2, 3, 5, 9, 10.

Legislation — Conflicting legislation — CRTC adopting policy establishing market-based value for signal regulatory regime — Policy empowering broadcasters to negotiate direct compensation for retransmission of signals by BDUs, as well as right to prohibit BDUs from retransmitting those signals if negotiations unsuccessful — Whether proposed regime conflicting with Copyright Act — Whether Copyright Act limiting discretion of CRTC in exercising regulatory and licensing powers under Broadcasting Act — Broadcasting Act, S.C. 1991, c. 11, ss. 2, 3, 5, 9, 10 — Copyright Act, R.S.C. 1985, c. C-42, ss. 2, 21, 31, 89.

Responding to recent changes to the broadcasting business environment, in 2010 the CRTC sought to introduce a market-based value for signal regulatory regime, whereby private local television stations could choose to negotiate direct compensation for the retransmission of their signals by BDUs, such as cable and satellite companies. The new regime would empower broadcasters to authorize or prohibit BDUs from retransmitting their programming services. The BDUs disputed the jurisdiction of the CRTC to implement such a regime on the basis that it conflicts with specific provisions in the *Copyright Act*. As a result, the CRTC referred the question of its jurisdiction to the Federal Court of Appeal, which held the proposed regime was within the statutory authority of the CRTC pursuant to its broad mandate under the *Broadcasting Act* to regulate and supervise all aspects

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit des communications — Radiodiffusion — Adoption par le Conseil de la radiodiffusion et des télécommunications canadiennes (« CRTC ») d'une politique établissant un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché — Politique habilitant les stations privées de télévision locale (« radiodiffuseurs ») à négocier une compensation directe pour la retransmission de leurs signaux par les entreprises de câblodistribution et de communications par satellite (« entreprises de distribution de radiodiffusion » ou « EDR »), et leur conférant le droit d'interdire aux EDR de retransmettre ces signaux en cas d'échec des négociations — Le CRTC a-t-il compétence en vertu de la Loi sur la radiodiffusion pour mettre en œuvre le régime proposé? — Loi sur la radiodiffusion, L.C. 1991, ch. 11, art. 2, 3, 5, 9, 10.

Législation — Conflit de lois — Adoption par le CRTC d'une politique établissant un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché — Politique habilitant les radiodiffuseurs à négocier une compensation directe pour la retransmission de leurs signaux par les EDR, et leur conférant le droit d'interdire aux EDR de retransmettre ces signaux en cas d'échec des négociations — Le régime proposé entre-t-il en conflit avec la Loi sur le droit d'auteur? — Cette loi limite-t-elle la discrétion du CRTC lorsqu'il exerce les pouvoirs de prise de règlements et d'attribution de licences que lui confère la Loi sur la radiodiffusion? — Loi sur la radiodiffusion, L.C. 1991, ch. 11, art. 2, 3, 5, 9, 10 — Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42, art. 2, 21, 31, 89.

Réagissant à des changements récents survenus dans l'industrie de la radiodiffusion, le CRTC a proposé en 2010 d'établir un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché. Suivant ce régime, les stations privées de télévision locale auraient la faculté de négocier une compensation directe pour la retransmission de leurs signaux par des EDR telles les entreprises de câblodistribution et les sociétés de communications par satellite. En vertu de ce nouveau régime, les radiodiffuseurs auraient la possibilité de permettre ou d'interdire aux EDR de retransmettre leurs services de programmation. Les EDR ont contesté la compétence du CRTC pour mettre en œuvre un tel régime, au motif qu'il entre en conflit avec certaines dispositions de la *Loi sur le droit d'auteur*. En conséquence, le CRTC a renvoyé une question touchant sa propre compétence devant la Cour

of the Canadian broadcasting system, and that no conflict existed between the regime and the *Copyright Act*.

Held (Deschamps, Abella, Cromwell and Karakatsanis JJ. dissenting): The appeal should be allowed. The proposed regulatory regime is *ultra vires* the CRTC.

Per McLachlin C.J. and LeBel, Fish, Rothstein and Moldaver JJ.: The provisions of the *Broadcasting Act*, considered in their entire context, may not be interpreted as authorizing the CRTC to implement the proposed value for signal regime.

No provision of the *Broadcasting Act* expressly grants jurisdiction to the CRTC to implement the proposed regime, and it was not sufficient for the CRTC to find jurisdiction by referring in isolation to policy objectives in s. 3 and deem that the proposed value for signal regime would be beneficial for the achievement of those objectives. Establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act cannot be a sufficient test for conferring jurisdiction on the CRTC. Policy statements are not jurisdiction-conferring provisions and cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament. Similarly, a broadly drafted basket clause in respect of regulation making authority (s. 10(1)(k)), or an open-ended power to insert “such terms and conditions as the [regulatory body] deems appropriate” when issuing licences (s. 9(1)(h)) cannot be read in isolation, but rather must be taken in context with the rest of the section in which it is found. Here, none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs or the direct economic relationship between BDUs and broadcasters. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too far removed from the core purposes intended by Parliament and from the powers granted to the CRTC under that Act.

d’appel fédérale. Cette dernière a conclu que le régime proposé relevait de la compétence reconnue par la loi au CRTC, conformément au vaste mandat que lui confère la *Loi sur la radiodiffusion* en matière de réglementation et de surveillance de tous les aspects du système de radiodiffusion canadien, et qu’il n’existait aucun conflit entre le régime proposé et la *Loi sur le droit d’auteur*.

Arrêt (les juges Deschamps, Abella, Cromwell et Karakatsanis sont dissidents) : Le pourvoi est accueilli. Le régime de réglementation proposé excède les pouvoirs du CRTC.

La juge en chef McLachlin et les juges LeBel, Fish, Rothstein et Moldaver : Lorsqu’on les interprète à la lumière de leur contexte global, on ne peut considérer que les dispositions de la *Loi sur la radiodiffusion* ont pour effet d’autoriser le CRTC à mettre en œuvre le régime proposé de compensation pour la valeur des signaux.

Aucune disposition de la *Loi sur la radiodiffusion* ne confère expressément au CRTC le pouvoir de mettre en œuvre le régime proposé, et il ne suffisait pas à ce dernier de se référer isolément à certains des objectifs de politique énoncés à l’art. 3 et de postuler que le régime proposé de compensation pour la valeur des signaux contribuerait à la réalisation de ces objectifs. La possibilité d’établir l’existence d’un lien — aussi tenu soit-il — entre un règlement projeté et un objectif de politique énuméré à l’art. 3 de la Loi ne saurait constituer un critère suffisant pour donner compétence au CRTC. Des énoncés de politique ne sont pas des dispositions attributives de compétence et ne peuvent pas servir à élargir les pouvoirs de cet organisme à des domaines non précisés par le législateur. De même, une clause générale rédigée en termes larges accordant un pouvoir général de prendre des règlements (al. 10(1)(k)) ou une disposition conférant à l’organisme de réglementation un pouvoir non défini l’autorisant à délivrer des licences « selon les modalités qu’il précise » (al. 9(1)(h)) ne peut être interprétée isolément, mais doit être considérée dans le contexte du reste de l’article dans lequel elle se trouve. En l’espèce, aucun des sujets précis et susceptibles d’être réglementés qui sont énumérés au par. 10(1) ne se rapporte à la création de droits exclusifs qui permettraient aux radiodiffuseurs d’autoriser ou d’interdire la distribution de signaux ou d’émissions, ou de contrôler les rapports économiques directs entre les EDR et les radiodiffuseurs. Il ressort d’une interprétation de la *Loi sur la radiodiffusion* qui tient compte du contexte global de celle-ci que la création de tels droits constitue une mesure beaucoup trop éloignée des objectifs fondamentaux visés par le législateur ainsi que des pouvoirs conférés au CRTC par cette loi.

Even if jurisdiction for the proposed value for signal regime could be found within the text of the *Broadcasting Act*, the proposed regime would conflict with specific provisions enacted by Parliament in the *Copyright Act*. First, the value for signal regime conflicts with s. 21(1) because it would grant broadcasters a retransmission authorization right against BDUs that was withheld by the scheme of the *Copyright Act*. A broadcaster's s. 21(1)(c) exclusive right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not include a right to authorize or prohibit a BDU from retransmitting those communication signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in s. 21(1), specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate balance between authors' and users' rights as expressed by Parliament in s. 21(1).

Second, further conflict arises between the value for signal regime and the retransmission rights in s. 31, which creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a "work" carried in local signals. The value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. The value for signal regime would effectively overturn the s. 31 exception, entitling broadcasters to control the simultaneous retransmission of works while the *Copyright Act* specifically excludes retransmission from the control of copyright owners, including broadcasters. In doing so, it would rewrite the balance between the owners' and users' interests as set out by Parliament in the *Copyright Act*. Because the CRTC's value for signal regime is inconsistent with the purpose of the *Copyright Act*, it falls outside of the scope of the CRTC's licensing

Même si l'on pouvait trouver dans le texte de la *Loi sur la radiodiffusion* la compétence nécessaire pour mettre en œuvre le régime proposé de compensation pour la valeur des signaux, le régime proposé entrerait en conflit avec certaines dispositions précises édictées par le Parlement dans la *Loi sur le droit d'auteur*. Premièrement, le régime de compensation pour la valeur des signaux entre en conflit avec le par. 21(1) de cette dernière loi, en ce qu'il accorderait aux radiodiffuseurs le droit d'autoriser ou non la retransmission de signaux par les EDR, droit qui a été refusé aux radiodiffuseurs par le régime établi par la *Loi sur le droit d'auteur*. Le droit exclusif conféré aux radiodiffuseurs par l'al. 21(1)c) — à savoir autoriser, ou refuser d'autoriser, un autre radiodiffuseur à retransmettre simultanément ses signaux — n'emporte pas celui de permettre ou d'interdire à une EDR de retransmettre ces signaux de communication. Il ne serait pas logique de la part du législateur fédéral d'instaurer au par. 21(1) un droit de retransmission soigneusement élaboré, qui soustrait explicitement les EDR du champ d'application du droit exclusif des radiodiffuseurs sur la retransmission simultanée de leurs signaux, mais d'habiliter par ailleurs un organisme de réglementation subalterne à créer un droit fonctionnellement équivalent par l'entremise d'un régime connexe. Le régime de compensation pour la valeur des signaux nuirait à la réalisation de l'objectif de la *Loi sur le droit d'auteur* qui consiste à établir un équilibre adéquat entre les droits des créateurs et ceux des utilisateurs, tel qu'il a été exprimé par le législateur au par. 21(1).

Deuxièmement, le régime de compensation pour la valeur des signaux entre également en conflit avec le droit de retransmission énoncé à l'art. 31, lequel crée une exception écartant la violation du droit d'auteur dans le cas de la retransmission simultanée par une EDR d'une « œuvre » portée par des signaux locaux. Toutefois, suivant le régime de compensation pour la valeur des signaux, les radiodiffuseurs jouiraient du droit d'exiger le retrait de certaines émissions. Ainsi, un radiodiffuseur qui n'arriverait pas à s'entendre avec une EDR sur la compensation payable pour la distribution de ses services de programmation aurait le droit d'exiger de cette EDR qu'elle retire de tous les signaux qu'elle distribue toute émission à l'égard de laquelle le radiodiffuseur aurait acquis les droits exclusifs de diffusion. Le régime de compensation pour la valeur des signaux aurait concrètement pour effet de réduire à néant l'exception prévue par l'art. 31, en accordant aux radiodiffuseurs le droit de contrôler la retransmission simultanée des œuvres, alors que la *Loi sur le droit d'auteur* exclut expressément cette activité du droit de contrôle des titulaires du droit d'auteur, y compris

and regulatory jurisdiction under the *Broadcasting Act*.

Section 31(2)(b), which provides that in order for the exception to copyright to apply the retransmission must be “lawful under the *Broadcasting Act*”, is also not sufficient to ground the CRTC’s jurisdiction to implement the value for signal regulatory regime. A general reference to “lawful under the *Broadcasting Act*” cannot authorize the CRTC, acting under open-ended jurisdiction-conferring provisions, to displace the specific direction of Parliament in the *Copyright Act*. Finally, the value for signal regime would create a new right to authorize and prevent retransmission, in effect, amending the copyright conferred by s. 21. Thus the value for signal regime would create a new type of copyright and would do so without the required Act of Parliament, contrary to s. 89.

Per Deschamps, Abella, Cromwell and Karakatsanis JJ. (dissenting): The CRTC determined that the proposed regime was necessary to preserve the viability of local television stations and ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act*. Courts have consistently determined the validity of the CRTC’s exercises of power under the *Broadcasting Act* by asking whether the power was exercised in connection with a policy objective in s. 3(1). This broad jurisdiction flows from the fact that the Act contains generally-worded powers for the CRTC to regulate and supervise all aspects of the Canadian broadcasting system, to impose licensing conditions, and to make regulations as the CRTC deems appropriate to implement the objects set out in s. 3(1).

The proposed regime is within the CRTC’s regulatory jurisdiction since it is demonstrably linked to several of the basic operative broadcasting policies in s. 3. The regime is merely an extension of the current regime, which places conditions, including financial ones, on BDUs for the licence to retransmit local stations’ signals. This broad mandate to set licensing conditions in furtherance of Canada’s broadcasting

les radiodiffuseurs. Ce faisant, le régime redéfinirait l’équilibre qu’a établi le législateur, dans la *Loi sur le droit d’auteur*, entre les intérêts respectifs des titulaires du droit d’auteur et des utilisateurs. Comme ce régime est incompatible avec l’objet visé par la *Loi sur le droit d’auteur*, il échappe à la compétence conférée au CRTC par la *Loi sur la radiodiffusion* en matière de délivrance de licences et de réglementation.

L’alinéa 31(2)b) — qui précise que, pour que s’applique l’exception écartant la violation du droit d’auteur, la retransmission doit être « licite en vertu de la *Loi sur la radiodiffusion* » — n’est pas non plus une assise suffisante afin de donner au CRTC compétence pour mettre en œuvre le régime réglementaire de compensation pour la valeur des signaux. L’expression générale « licite en vertu de la *Loi sur la radiodiffusion* » ne saurait autoriser le CRTC, lorsqu’il agit en vertu de dispositions attributives de compétence générales, à écarter une prescription précise du législateur dans la *Loi sur le droit d’auteur*. Enfin, le régime de compensation pour la valeur des signaux créerait un nouveau droit permettant à son titulaire d’autoriser et d’interdire la retransmission de signaux, modifiant ainsi concrètement le droit d’auteur conféré par l’art. 21. Ce régime créerait donc un nouveau type de droit d’auteur, sans la loi fédérale requise par l’art. 89.

Les juges Deschamps, Abella, Cromwell et Karakatsanis (dissidents) : Le CRTC a jugé que le nouveau régime était nécessaire pour assurer la survie des stations locales et la réalisation des objectifs de la politique de radiodiffusion énoncée au par. 3(1) de la *Loi sur la radiodiffusion*. Les tribunaux ont systématiquement statué sur la validité de l’exercice par le CRTC des pouvoirs que lui accorde la *Loi sur la radiodiffusion* en se demandant s’il était possible de rattacher l’exercice du pouvoir en cause à l’un des objectifs de politique énumérés au par. 3(1). La vaste compétence reconnue au CRTC découle des pouvoirs que la Loi lui confère en termes généraux pour réglementer et surveiller tous les aspects du système de radiodiffusion canadien, assortir de certaines conditions les licences qu’il délivre et prendre des règlements, de la manière qu’il estime indiquée pour la mise en œuvre des objectifs énoncés au par. 3(1).

Le régime proposé respecte la compétence du CRTC en matière de réglementation, étant donné qu’il se rattache manifestement à plusieurs des principes directeurs fondamentaux en matière de radiodiffusion énoncés à l’art. 3. Le nouveau régime n’est simplement que le prolongement du régime actuel, lequel impose plusieurs conditions — y compris de nature financière — aux EDR en vue de l’obtention d’une licence

policy is analogous to the CRTC's broad mandate to set rates, recently upheld by this Court in *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764.

The proposed regime does not create a conflict with the *Copyright Act*. It does not give local stations a copyright in the retransmission of their television signals. BDUs derive their right to retransmit signals only from licences granted pursuant to s. 9 of the *Broadcasting Act*, and must meet the conditions imposed by the CRTC on their retransmission licences, including those set out in the proposed regime. Nothing in either the definition of "broadcaster" or in s. 21(1)(c) of the *Copyright Act* immunizes BDUs from licensing requirements put in place by the CRTC in accordance with its broadcasting mandate.

The BDUs' argument that the proposed regime creates royalties for local signals contrary to s. 31(2)(d) of the *Copyright Act*, turns s. 31(2)(d) on its head. Section 31(2)(d) simply requires that BDUs pay a royalty to copyright owners for retransmitting "distant signals". This provision has nothing to do with whether the BDUs can be required to compensate local stations for a different purpose, namely, to fulfill the conditions of their retransmission license under the *Broadcasting Act*.

Cases Cited

By Rothstein J.

Referred to: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772; *R. v. Ulybel Enterprises Ltd.*, 2001

de retransmission des signaux des stations locales. Ce large mandat d'assortir les licences de certaines conditions pour favoriser la mise en œuvre de la politique canadienne de radiodiffusion est analogue au large mandat du CRTC en matière d'établissement de tarifs, lequel a été confirmé récemment par notre Cour dans l'arrêt *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764.

Le régime proposé ne crée pas de conflit avec la *Loi sur le droit d'auteur*. Il ne confère pas aux stations locales un droit d'auteur à l'égard de la retransmission de leurs signaux de télévision. Les EDR tiennent leur droit de retransmettre des signaux uniquement des licences qui leur sont attribuées en vertu de l'art. 9 de la *Loi sur la radiodiffusion*, et elles doivent satisfaire aux conditions dont le CRTC a assorti leur licence, y compris celles prévues dans le régime proposé. Rien dans l'al. 21(1)(c) de la *Loi sur le droit d'auteur* ou dans la définition de « radiodiffuseur » n'a pour effet de soustraire les EDR aux exigences établies par le CRTC en matière d'attribution de licences dans le cadre de son mandat relatif à la radiodiffusion.

L'argument des EDR selon lequel le régime proposé exige le paiement de redevances pour la retransmission de signaux locaux fait dire à l'al. 31(2)(d) de la *Loi sur le droit d'auteur* quelque chose qu'il ne dit pas. Cet alinéa requiert simplement que les EDR qui retransmettent des « signaux éloignés » versent des redevances aux titulaires des droits d'auteur sur ces signaux. Cette disposition n'a aucun lien avec la question de savoir si les EDR peuvent être requises de verser une compensation aux stations locales pour une autre fin, à savoir pour satisfaire aux conditions assortissant leurs licences de retransmission en vertu de la *Loi sur la radiodiffusion*.

Jurisprudence

Citée par le juge Rothstein

Arrêts mentionnés: *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; *Renvoi relatif à la Loi sur la radiodiffusion*, 2012 CSC 4, [2012] 1 R.C.S. 142; *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476; *CKOY Ltd. c. La Reine*, [1979] 1 R.C.S. 2; *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764; *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140; *Ontario c. Canadian Pacific Ltée*, [1995] 2 R.C.S. 1031; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606; *Théberge c. Galerie d'Art du Petit Champlain inc.*, 2002 CSC 34, [2002] 2 R.C.S. 336; *Mattel, Inc. c. 3894207 Canada Inc.*, 2006 CSC 22, [2006] 1 R.C.S. 772; *R. c. Ulybel*

SCC 56, [2001] 2 S.C.R. 867; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283.

By Abella and Cromwell JJ. (dissenting)

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CarswellNat 398. Appeal allowed, Deschamps, Abella, Cromwell and Karakatsanis dissenting.

Neil Finkelstein, Steven G. Mason and Daniel G. C. Glover, for the appellant Cogeco Cable Inc.

Gerald L. Kerr-Wilson and Ariel Thomas, for the appellants Rogers Communications Inc. and TELUS Communications Company.

Kent E. Thomson, James Doris and Sarah Weingarten, for the appellant Shaw Communications Inc.

Benjamin Zarnett, Robert Malcomson, Peter Ruby and Julie Rosenthal, for the respondents Bell Media Inc. (formerly CTV Globemedia Inc.), V Interactions Inc. and Newfoundland Broadcasting Co. Ltd.

No one appeared for the respondent Canwest Television Limited Partnership.

No one appeared for the intervener.

The judgment of McLachlin C.J. and LeBel, Fish, Rothstein and Moldaver JJ. was delivered by

ROTHSTEIN J. —

I. Introduction

[1] The Canadian Radio-television and Telecommunications Commission (“CRTC”) has authority under the *Broadcasting Act*, S.C. 1991, c. 11, to regulate and supervise the Canadian broadcasting system. In 2010, the CRTC sought to introduce a market-based value for signal regulatory regime, whereby private local television stations (referred to as such or as “broadcasters”) could choose to negotiate direct compensation for the retransmission of their signals by broadcasting distribution undertakings (“BDUs”), such as cable and satellite companies. The new regime would empower broadcasters to authorize or prohibit BDUs from retransmitting their programming services. The reference question in this appeal is

CarswellNat 6332. Pourvoi accueilli, les juges Deschamps, Abella, Cromwell et Karakatsanis sont dissidents.

Neil Finkelstein, Steven G. Mason et Daniel G. C. Glover, pour l’appelante Cogeco Câble Inc.

Gerald L. Kerr-Wilson et Ariel Thomas, pour les appelantes Rogers Communications Inc. et TELUS Communications Company.

Kent E. Thomson, James Doris et Sarah Weingarten, pour l’appelante Shaw Communications Inc.

Benjamin Zarnett, Robert Malcomson, Peter Ruby et Julie Rosenthal, pour les intimées Bell Media Inc. (auparavant CTV Globemedia Inc.), V Interactions Inc. et Newfoundland Broadcasting Co. Ltd.

Personne n’a comparu pour l’intimée Canwest Television Limited Partnership.

Personne n’a comparu pour l’intervenant.

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Fish, Rothstein et Moldaver rendu par

LE JUGE ROTHSTEIN —

I. Introduction

[1] Le Conseil de la radiodiffusion et des télécommunications canadiennes (« CRTC ») possède, en vertu de la *Loi sur la radiodiffusion*, L.C. 1991, ch. 11, le pouvoir de réglementer et de surveiller le système canadien de radiodiffusion. En 2010, le CRTC a proposé d’établir un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché. Suivant ce régime, les stations privées de télévision locale (également appelées « radiodiffuseurs » dans les présents motifs) auraient la faculté de négocier une compensation directe pour la retransmission de leurs signaux par des entreprises de distribution de radiodiffusion (« EDR ») telles les entreprises de câblo-distribution et les sociétés de communications par

at §3.21). In *Bell ExpressVu*, at para. 52, Justice Iacobucci also considered the *Copyright Act* when interpreting a provision of the *Radiocommunication Act*, saying that “there is a connection between these two statutes”. Considering that the *Broadcasting Act* and the *Radiocommunication Act* are clearly part of the same interconnected statutory scheme, it follows, in my view, that there is a connection between the *Broadcasting Act* and the *Copyright Act* as well. The three Acts (plus the *Telecommunications Act*) are part of an interrelated scheme.

[35] Indeed, the *Broadcasting Act* regulates “program[s]” that are “broadcast” for reception by the Canadian public (see s. 2(1), definitions of “broadcasting” and of “program”), with a view to implementing the Canadian broadcasting policy described in s. 3(1) of the Act. Generally speaking, “[t]he *Broadcasting Act* is primarily concerned with the programmed content delivered by means of radio waves or other means of telecommunication to the public” (Handa et al., at §5.5).

[36] The *Copyright Act* is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavour. These objectives are furthered by a carefully balanced scheme that creates exclusive economic rights for different categories of copyright owners in works or other protected subject matter, typically in the nature of a statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner’s consent. It also provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions. (See, e.g., *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at paras. 11-12 and 30; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772,

de signaux, et la *Loi sur la radiodiffusion* porte pour sa part sur le contenu des signaux, lequel constitue [TRADUCTION] « l’objet de la “distribution” » (S. Handa et autres, *Communications Law in Canada* (éd. feuilles mobiles), §3.21). Dans l’arrêt *Bell ExpressVu*, par. 52, alors qu’il interprétait une disposition de la *Loi sur les radiocommunications*, le juge Iacobucci a également examiné la *Loi sur le droit d’auteur*, soulignant qu’il existait « un lien entre cette loi et celle sur le droit d’auteur ». Étant donné que la *Loi sur la radiodiffusion* et la *Loi sur la radiocommunication* font clairement partie du même régime législatif, il s’ensuit selon moi qu’il existe aussi un lien entre la *Loi sur la radiodiffusion* et la *Loi sur le droit d’auteur*. Ces trois lois (ainsi que la *Loi sur les télécommunications*) sont des éléments d’un régime de mesures interreliées.

[35] D’ailleurs, la *Loi sur la radiodiffusion* régit les « émissions » qui sont « diffusées » et destinées à être reçues par le public canadien (voir, au par. 2(1), la définition des termes « radiodiffusion » et « émission »), en vue de mettre en œuvre la politique canadienne de radiodiffusion énoncée au par. 3(1) de la Loi. De façon générale, [TRADUCTION] « [l]a *Loi sur la radiodiffusion* s’intéresse principalement au contenu de la programmation diffusée au public au moyen d’ondes radio ou d’autres moyens de télécommunication » (Handa et autres, §5.5).

[36] La *Loi sur le droit d’auteur* vise à la fois à encourager la créativité et à permettre aux créateurs de jouir raisonnablement du fruit de leur travail de création. La concrétisation de ces objectifs est favorisée par l’existence d’un régime soigneusement équilibré qui confère des droits économiques exclusifs à différentes catégories de titulaires du droit d’auteur sur leurs œuvres ou sur un autre objet protégé, généralement au moyen d’un monopole légal qui interdit à quiconque d’exploiter l’œuvre de certaines façons précises sans le consentement du titulaire du droit d’auteur. Ce régime établit également des droits d’utilisation telles l’utilisation équitable et certaines exemptions précises autorisant le public en général ou des catégories particulières d’utilisateurs à accéder au contenu protégé moyennant le respect de certaines conditions. (Voir, p. ex.,

at para. 21; D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at pp. 34 and 56.) Among the categories of subject matter protected by copyright are the rights of broadcasters in communication signals (see ss. 2 “copyright” and 21 of the *Copyright Act*). In addition, “program[s]” within the meaning of the *Broadcasting Act*, are often pre-recorded original content which may constitute protected works, namely “dramatic work[s]” or “compilation[s]” thereof, under the *Copyright Act*: see, e.g., discussion in J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at para. 15:3(a).

Théberge c. Galerie d'Art du Petit Champlain inc., 2002 CSC 34, [2002] 2 R.C.S. 336, par. 11-12 et 30; *Mattel, Inc. c. 3894207 Canada Inc.*, 2006 CSC 22, [2006] 1 R.C.S. 772, par. 21; D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2^e éd. 2011), p. 34 et 56.) Parmi les catégories d'objets protégés par le droit d'auteur, mentionnons les droits des radiodiffuseurs sur les signaux de communication (voir la définition de « droit d'auteur » à l'art. 2, ainsi que l'art. 21 de la *Loi sur le droit d'auteur*). Qui plus est, les « émission[s] » au sens de la *Loi sur la radiodiffusion* se présentent souvent sous forme de contenu original préenregistré susceptible de constituer une œuvre protégée, à savoir des « œuvre[s] dramatique[s] » ou des « compilation[s] » de telles œuvres au sens de la *Loi sur le droit d'auteur* : voir, p. ex., l'analyse dans J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4^e éd. (feuilles mobiles)), par. 15:3(a).

[37] Although the Acts have different aims, their subject matters will clearly overlap in places. As Parliament is presumed to intend “harmony, coherence, and consistency between statutes dealing with the same subject matter” (*R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 52; Sullivan, at pp. 325-26), two provisions applying to the same facts will be given effect in accordance with their terms so long as they do not conflict.

[37] Bien que les deux lois visent des objectifs différents, les sujets dont elles traitent se recoupent inévitablement. Comme le législateur est présumé avoir voulu « l'harmonie, la cohérence et l'uniformité entre les lois traitant du même sujet » (*R. c. Ulybel Enterprises Ltd.*, 2001 CSC 56, [2001] 2 R.C.S. 867, par. 52; Sullivan, p. 325-326), on donnera effet suivant leur libellé à deux dispositions s'appliquant aux mêmes faits, dès lors qu'elles n'entrent pas en conflit l'une avec l'autre.

[38] Accordingly, where multiple interpretations of a provision are possible, the presumption of coherence requires that the two statutes be read together so as to avoid conflict. Lamer C.J. wrote in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61:

[38] Par conséquent, lorsqu'une disposition se prête à plusieurs interprétations, la présomption de cohérence exige que, afin d'éviter les conflits, les lois en cause soient interprétées ensemble. Dans l'arrêt *Pointe-Claire (Ville) c. Québec (Tribunal du travail)*, [1997] 1 R.C.S. 1015, par. 61, le juge en chef Lamer a écrit ce qui suit :

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

Certes, selon le principe de la présomption de cohérence des lois qui portent sur des sujets analogues, l'interprète doit chercher l'harmonisation entre ces lois plutôt que leur contradiction

[39] In addition, “[o]rdinarily, . . . an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation” (*Friends of the Oldman River Society v. Canada (Minister of*

[39] De plus, « [n]ormalement, la loi fédérale doit l'emporter sur le texte réglementaire incompatible » (*Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1

Transport), [1992] 1 S.C.R. 3, at p. 38). Consequently, as it would be impermissible for the CRTC, a subordinate legislative body, to implement subordinate legislation in conflict with another Act of Parliament, the open-ended jurisdiction-conferring provisions of the *Broadcasting Act* cannot be interpreted as allowing the CRTC to create conflicts with the *Copyright Act*.

[40] It is therefore necessary to first determine if a conflict arises.

(2) Types of Conflict

[41] For the purposes of statutory interpretation, conflict is defined narrowly. It has been said that overlapping provisions will be given effect according to their terms, unless they “cannot stand together” (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488, at p. 499 *per* Anglin J.).

[42] In *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, the Court was concerned with incoherence between provisions of two statutes emanating from the same legislature. Bastarache J., writing for the majority, defined conflict, at para. 47:

The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:

According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.

(P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)

Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for

R.C.S. 3, p. 38). En conséquence, comme il ne serait pas permis au CRTC, en tant qu’organisme de réglementation subalterne, de mettre en œuvre un texte réglementaire qui entre en conflit avec une autre loi fédérale, les dispositions attributives de compétence de nature générale de la *Loi sur la radiodiffusion* ne peuvent être interprétées de manière à permettre au CRTC de créer des conflits avec la *Loi sur le droit d’auteur*.

[40] Il est donc nécessaire de décider tout d’abord s’il y a un conflit.

(2) Types de conflits

[41] En matière d’interprétation des lois, la notion de conflit est définie étroitement. Il a été jugé que des dispositions qui se chevauchent seront appliquées suivant leur libellé, à moins qu’elles [TRADUCTION] « ne puissent coexister » (*Toronto Railway Co. c. Paget* (1909), 42 R.C.S. 488, p. 499, le juge Anglin).

[42] Dans l’affaire *Lévis (Ville) c. Fraternité des policiers de Lévis Inc.*, 2007 CSC 14, [2007] 1 R.C.S. 591, la Cour s’est penchée sur l’incompatibilité de dispositions de deux lois émanant du même législateur. S’exprimant au nom de la majorité, le juge Bastarache a défini comme suit la notion de « conflit », au par. 47 :

Le critère à appliquer pour déterminer si un conflit est inévitable est clairement énoncé par le professeur Côté dans son traité d’interprétation des lois :

Selon la jurisprudence, deux lois ne sont pas en conflit du simple fait qu’elles s’appliquent à la même matière : il faut que l’application de l’une exclue, explicitement ou implicitement, celle de l’autre.

(P.-A. Côté, *Interprétation des lois* (3^e éd. 1999), p. 443)

Ainsi, une loi prévoyant que le passager d’un train qui ne paye pas son passage doit être expulsé n’est pas en conflit avec une autre loi prévoyant uniquement l’imposition d’une amende, parce que l’application d’une loi n’exclut pas l’application de l’autre loi (*Toronto Railway Co. c. Paget* (1909), 42 R.C.S. 488). Par contre, il y a un conflit inévitable lorsque deux lois sont directement contradictoires ou que leur application concurrente donnerait lieu à un résultat déraisonnable ou absurde. Par exemple, la

example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818). [Emphasis added.]

[43] Absurdity also refers to situations where the practical effect of one piece of legislation would be to frustrate the *purpose* of the other (*Lévis*, at para. 54; Sullivan, at p. 330).

[44] This view is not inconsistent with the approach to conflict adopted in federalism jurisprudence. For the purposes of the doctrine of paramountcy, this Court has recognized two types of conflict. Operational conflict arises when there is an *impossibility of compliance* with both provisions. The other type of conflict is incompatibility of purpose. In the latter type, there is no impossibility of dual compliance with the letter of both laws; rather, the conflict arises because applying one provision would frustrate the *purpose* intended by Parliament in another. See, e.g., *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at paras. 77 and 84.

[45] Cases applying the doctrine of federal paramountcy present some similarities in defining conflict as either operational conflict or conflict of purpose (*Friends of the Oldman River Society*, at p. 38). These definitions of legislative conflict are therefore helpful in interpreting two statutes emanating from the same legislature. The CRTIC's powers to impose licensing conditions and make regulations should be understood as constrained by each type of conflict. Namely, in seeking to achieve its objects, the CRTIC may not choose means that either operationally conflict with specific provisions of the *Broadcasting Act*, the *Radiocommunication Act*, the *Telecommunications Act*, or the *Copyright Act*; or which would be incompatible with the purposes of those Acts.

loi qui autorise la prorogation du délai de dépôt d'un appel uniquement avant l'expiration du délai est en conflit direct avec une autre loi qui autorise l'acceptation d'une demande de prorogation après l'expiration du délai (*Massicotte c. Boutin*, [1969] R.C.S. 818). [Je souligne.]

[43] On entend également par résultat absurde les situations où une loi aurait concrètement pour effet d'aller à l'encontre de l'*objet* de l'autre loi (*Lévis*, par. 54; Sullivan, p. 330).

[44] Cette conception n'est pas incompatible avec la notion de conflit retenue par la jurisprudence sur le fédéralisme. Pour l'application de la doctrine de la prépondérance des lois fédérales, notre Cour a reconnu l'existence de deux types de conflits. Il y a conflit d'application lorsqu'il est *impossible de se conformer* aux deux dispositions en même temps. L'autre type de conflits concerne les cas d'incompatibilité d'objets. Dans les conflits de ce deuxième type, il n'y a pas impossibilité de se conformer à la lettre des deux lois; le conflit découle plutôt du fait que l'application d'une disposition s'opposerait à l'*objet* qu'entend réaliser le Parlement dans une autre. Voir, p. ex., *Colombie-Britannique (Procureur général) c. Lafarge Canada Inc.*, 2007 CSC 23, [2007] 2 R.C.S. 86, par. 77 et 84).

[45] Les décisions dans lesquelles les tribunaux ont appliqué la doctrine de la prépondérance fédérale présentent certaines similitudes dans la mesure où l'on y définit les conflits comme des conflits d'application ou d'objets (*Friends of the Oldman River Society*, p. 38). Ces définitions de la notion de conflits de lois sont donc utiles pour interpréter deux lois émanant du même législateur. Le pouvoir du CRTIC de prendre des règlements et d'assortir de certaines conditions les licences qu'il délivre doit être considéré comme assujéti aux limites découlant de chaque type de conflits. Autrement dit, en vue de réaliser sa mission, le CRTIC ne peut choisir des moyens qui entraînent un conflit d'application avec des dispositions précises de la *Loi sur la radiodiffusion*, de la *Loi sur la radiocommunication*, de la *Loi sur les télécommunications* ou de la *Loi sur le droit d'auteur*, ou encore qui seraient incompatibles avec l'objet de ces diverses lois.

(3) The Allocation of Rights Under the Copyright Act(a) *Section 21*

[46] The BDUs contend that the CRTC's proposed value for signal regime conflicts with the retransmission regimes specifically established in ss. 21(1)(c) and 31(2) of the *Copyright Act*.

[47] It is necessary to describe the *Copyright Act*'s regimes at some length. It will become apparent from this description that, in my respectful view, the analysis of the *Copyright Act* conducted by the majority of the FCA is problematic.

[48] The BDUs first submit that s. 21(1) of the *Copyright Act* conflicts with the value for signal regime. Section 21(1) grants broadcasters a limited copyright in the over-the-air signals they broadcast. This copyright gives the broadcaster the sole right to authorize or to do four acts in relation to a communication signal or any substantial part of it:

- (a) to fix it;
- (b) to reproduce any fixation of it that was made without the broadcaster's consent;
- (c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast; and
- (d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (a), (b) or (d).

[49] The aspect relevant for this appeal is in para. (c). Under this paragraph, a broadcaster has the sole right to authorize another *broadcaster* to retransmit simultaneously a communication signal.

(3) Droits attribués par la Loi sur le droit d'auteura) *Article 21*

[46] Les EDR affirment que le régime de compensation pour la valeur des signaux proposé par le CRTC entre en conflit avec les régimes de retransmission expressément établis à l'al. 21(1)c) et au par. 31(2) de la *Loi sur le droit d'auteur*.

[47] Il est nécessaire de décrire de manière assez détaillée les régimes prévus par la *Loi sur le droit d'auteur*. À mon humble avis, cette description fera ressortir le caractère problématique de l'analyse de la *Loi sur le droit d'auteur* effectuée par les juges majoritaires de la CAF.

[48] Les EDR soutiennent tout d'abord que le par. 21(1) de la *Loi sur le droit d'auteur* entre en conflit avec le régime de compensation pour la valeur des signaux. Cette disposition accorde aux radiodiffuseurs un droit d'auteur limité sur les signaux qu'ils diffusent en direct. Ce droit d'auteur confère au radiodiffuseur le droit exclusif, à l'égard du signal de communication qu'il émet ou de toute partie importante de celui-ci, d'accomplir ou d'autoriser l'un des quatre actes suivants :

- a) de le fixer;
- b) d'en reproduire toute fixation faite sans son autorisation;
- c) d'autoriser un autre radiodiffuseur à le retransmettre au public simultanément à son émission;
- d) d'exécuter en public un signal de communication télévisuel en un lieu accessible au public moyennant droit d'entrée.

Il a aussi le droit d'autoriser les actes visés aux alinéas a), b) et d).

[49] L'aspect pertinent pour les besoins du présent pourvoi est celui prévu à l'al. c). Aux termes de cet alinéa, le radiodiffuseur a le droit exclusif d'autoriser un autre *radiodiffuseur* à retransmettre

26

User Name: Katrine Dilay

Date and Time: October 17, 2019 3:47:00 PM EDT

Job Number: 100391880

Document (1)

1. *Boles v. Manitoba (Social Services Appeal Board, Director, River East/Transcona), [2019] M.J. No. 160*

Client/Matter: -None-

Search Terms: 2019 MBCA 65

Search Type: Natural Language

Narrowed by:

Content Type
Cases

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-None-

 ***Boles v. Manitoba (Social Services Appeal Board, Director, River East/Transcona), [2019] M.J. No. 160***

Manitoba Judgments

Manitoba Court of Appeal

J. leMaistre J.A.

Heard: March 21, 2019.

Judgment: June 6, 2019.

Docket: A19-30-09223

[2019] M.J. No. 160 | 2019 MBCA 65

Between Susan Boles (Appellant) Applicant, and Director, River East/Transcona (Respondent) Respondent

(33 paras.)

Case Summary

Government law — Government assistance programs — Social assistance — Benefits — Calculation — Appeals and judicial review — Standard of review — Reasonableness — Practice and procedure — General principles — Legislation — Interpretation — Statutes — Regulations — Motion by applicant for leave to appeal decision of Social Services Appeal Board dismissed — Applicant received income assistance for disability — Board concluded income replacement indemnity applicant received after motor vehicle accident did not constitute employment earnings under work incentive provisions and indemnity payments were properly deducted from applicant's monthly income assistance — There was no arguable case of substance that Board's interpretation of its legislation did not fall within reasonable range of possible outcomes or interpretations.

Motion by the applicant for leave to appeal a decision of the Social Services Appeal Board. The applicant received income assistance for a disability. She had received employment income from part-time employment that was not deducted from her income assistance payments pursuant to work incentive provisions provided for in the Assistance Regulation. In 2015, the applicant was involved in a motor vehicle accident and while unable to work received an income replacement indemnity from Manitoba Public Insurance. The Board concluded the indemnity did not constitute employment earnings under the work incentive provisions and that the amount of the indemnity payments was properly deducted from the applicant's monthly income assistance.

HELD: Motion dismissed.

The standard of review that would be applied on the appeal was reasonableness. The applicant's appeal involved the interplay between legislation and therefore raised a question of law. The Board understood the principles of statutory interpretation and considered the purpose of the legislation. It conducted a contextual analysis by examining the nature of the indemnity payments and how they were funded. Having found no ambiguity in the legislation, there was no need for the Board to consider Charter values as an interpretive aid. There was no arguable case of substance that the Board's interpretation of its legislation did not fall within a reasonable range of possible outcomes or interpretations. Refusing leave would not create an injustice.

Statutes, Regulations and Rules Cited:

Assistance Regulation, *Man. Reg. 404/88R*, s. 4(1), s. 8(4), s. 8(5), s. 8(5)(a)

Canadian Charter of Rights and Freedoms, 1982,

The Interpretation Act, *C.C.S.M. c. 180*, s. 6

The Manitoba Assistance Act, *C.C.S.M. c. A150*, s. 1, s. 5(1)(a) (i)

The Manitoba Public Insurance Corporation Act, *C.C.S.M. c. P215*, s. 83(1)

The Social Services Appeal Board Act, *C.C.S.M. c. S167*, s. 23(1)

Counsel

J.B. Williams and K.M. Dilay, for the Applicant.

D.L. Carlson and A.J. Ladyka, for the Respondent.

J. leMAISTRE J.A.

14 Section 23(1) of *The Social Services Appeal Board Act*, CCSM c S167 provides that leave to appeal to the Court of Appeal may only be granted on a question of law or jurisdiction. Additionally, as this Court has previously stated, the applicant must have an arguable case that has a reasonable prospect of success; the question of law or jurisdiction must raise an issue that warrants the attention of the Court; and the Court may also consider whether the denial of leave could result in an injustice (see *Rolling River School Division v Rolling River Teachers' Association of the Manitoba Teachers' Society et al*, 2009 MBCA 38 at paras 12-13; and *Stadler v Director, St Boniface/St Vital*, 2018 MBCA 103 at paras 14-15).

15 Arguable merit is established if the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law (see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 74).

16 As explained by Steel JA in *Harder v Director Fort Garry/River Heights*, 2017 MBCA 11, the applicable standard of review is a relevant factor when considering the "reasonable prospect of success" criterion (at para 13):

When considering the third criterion as to whether there is a reasonable prospect of success, it is appropriate for the court to consider the standard of review that would be applied by the court on appeal on the basis that it relates to the "reasonable prospect of success" (*Sterling O & G International Corp v Director of Employment Standards Division (Man)*, 2012 MBCA 18 at para 18, 275 ManR (2d) 280 (in chambers); see also *Harder v Manitoba Public Insurance Corp et al*, 2012 MBCA 20 at paras 28-29, 275 ManR (2d) 298; and *Green v Houston Recruiting Services Ltd*, 2011 MBCA 16 at para 27, 262 ManR (2d) 177).

Positions of the Parties

17 The parties agree, as do I, that the standard of review that would be applied on the appeal is reasonableness (see *Murray v Director of Employment and Income Assistance (Man)*, 2015 MBCA 66 at para 18; and *Stadler v Director, St Boniface*, 2017 MBCA 108 at para 10).

18 The applicant asserts that the Board erred in law by concluding that the indemnity does not meet the definition of employment earnings in the work incentive provisions.

19 In terms of the merits of the appeal, the applicant argues that the Board's decision is unreasonable because it failed to apply *The Interpretation Act*, CCSM c 180, principles of modern statutory interpretation and *Charter* values, and it failed to find the term employment earnings is ambiguous. She asserts that the Board applied a narrow, non-contextual approach focussing on the source and nature of the indemnity rather than conducting a purposive and contextual analysis. She says that because the Board grappled with the wrong issues and employed a flawed analysis, its decision is not reasonable.

20 Finally, she contends that the outcome of her appeal may assist in determining similar disputes regarding other types of income replacement benefits.

21 The respondent accepts that the issue in this case involves statutory interpretation which is a question of law and that there may be other recipients of income assistance who could be affected by the outcome of this appeal. It also agrees with the principles of statutory interpretation as outlined by the applicant. However, it asserts that the applicant has not raised an arguable case of substance and, therefore, the motion for leave to appeal should be dismissed. It argues that the Board's conclusion that the indemnity "is not encompassed by the term 'employment earnings' as found in the work incentive provisions was reasonable."

Discussion

22 I agree with the parties that the applicant's appeal involves the interplay between two statutes and, therefore, it raises a question of law.

Principles of Statutory Interpretation

23 As previously indicated, the parties agree on the approach to be taken when interpreting a provision in a statute. The applicable principles include the following:

- 1* Section 6 of *The Interpretation Act* mandates that, "Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects."
- 1* The modern approach to statutory interpretation requires that, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87; see also *Manitoba Housing v Amyotte et al*, 2014 MBCA 54 at paras 50-52).
- 1* The entire context of a provision must be considered before determining whether it is reasonably capable of multiple interpretations. Ambiguity results only "where a statutory provision is subject to differing, but equally plausible, interpretations" (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62; see also para 29).
- 1* When interpreting legislation, *Charter* values are considered only where there is a "genuine ambiguity" (*ibid* at para 62).
- 1* Any ambiguities in social welfare legislation "should be resolved in favour of the claimant" (*Finlay v Canada (Minister of Finance)*, [1993] 1 SCR 1080 at 1114, quoting *Abrahams v Attorney General of Canada*, [1983] 1 SCR 2 at 10).

Is There an Arguable Case of Substance?

24 In light of the respondent's position, the issue to be determined on the motion for leave to appeal is whether there is an arguable case of substance.

25 As explained by Moldaver J in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, "under reasonableness review, [appellate courts] defer to any reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist" (at para 40).

26 The applicant argues that there were two interpretations available to the Board: the narrow, non-contextual approach she says the Board took; and a broader, purposive and contextual interpretation that she advocated. She says that the Board erred in its approach and that this led to an unreasonable conclusion. I disagree, for four reasons.

27 First, the Board understood the principles of statutory interpretation and recognised that much of the expert's evidence addressed "broader policy issues" which are not relevant when interpreting legislation.

28 Second, the Board considered the purpose of the legislation and concluded that the respondent's "current treatment of [the indemnity] payments does not negate the intended incentive effects of [the work incentive provisions], and therefore is not contrary to the intent of the Act or Regulation." In reaching this conclusion, the Board considered the expert's opinion that the work incentive provisions are irrelevant for individuals who are unable to work.

29 Third, when considering the purpose of the indemnity, the Board conducted a contextual analysis by examining the nature of the payments and how they are funded.

30 Fourth, the Board thoroughly reviewed the arguments made at the appeal hearing, including whether the legislation is ambiguous and whether there was a clear nexus between the indemnity and employment before confirming the respondent's decision to treat the indemnity as unearned income. The Board concluded that there was no clear nexus between the indemnity and employment, and that there was no ambiguity in the use of the term "employment earnings". Having found that there was no ambiguity in the legislation, there was no need for the Board to consider *Charter* values as an interpretive aid.

31 In the end, I have not been persuaded that there is an arguable case of substance that the Board's interpretation of its legislation does not fall within a reasonable range of possible outcomes or interpretations (see *Murray* at para 18; and *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). In other words, in light of the applicable standard of review, the applicant does not have an arguable case that has a reasonable prospect of success. Therefore, there is no need for a more thorough examination of the legal question (see *Sattva* at para 74).

32 In addition, while it is unfortunate that the applicant lost her ability to supplement her income assistance through part-time employment, I have also not been persuaded that refusing leave would create an injustice in the circumstances of this case.

Conclusion

33 In the result, the motion for leave to appeal is dismissed without costs.

J. leMAISTRE J.A.

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User Name: Katrine Dilay

Date and Time: October 17, 2019 3:49:00 PM EDT

Job Number: 100392214

Document (1)

1. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27

Client/Matter: -None-

Search Terms: [1998] 1 SCR 27

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
-None-

 ***Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27**

Supreme Court Reports

Supreme Court of Canada

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

1997: October 16 / 1998: January 22.

File No.: 24711.

[\[1998\] 1 S.C.R. 27](#) | [\[1998\] 1 R.C.S. 27](#) | [\[1998\] S.C.J. No. 2](#) | [\[1998\] A.C.S. no 2](#)

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, appellants; v. Zittler, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, respondent, and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, party.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or

severance pay was owing to former employees under the Employment Standards Act ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to severance, termination or vacation pay under the ESA. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA.

Held:

The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40a of the ESA suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's Interpretation Act provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the ESA and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40a to be inapplicable in bankruptcy situations is incompatible with both the object of the ESA and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbitrarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the Employment Standards Amendment Act, 1981 exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the ESA is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40a are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The

impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the ESA. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the Bankruptcy Act for termination and severance pay in accordance with ss. 40 and 40a of the ESA. It was not necessary to address the applicability of s. 7(5) of the ESA.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; referred to: *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C., 1985, c. B-3 [now the Bankruptcy and Insolvency Act], s. 121(1).
Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40a(1) [rep. & sub. *ibid.*, s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. par. 210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. par. 14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and Kathleen Martin, for the appellants. Raymond M. Slattery, for the respondent. David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto. Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto. Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

The judgment of the Court was delivered by

IACOBUCCI J.

1 This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittler, Sibling & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the Employment Standards Act, R.S.O. 1980, c. 137, as amended (the "ESA"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately \$2.6 million and for severance pay totalling \$14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the ESA.

(s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the ESA, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the ESA termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the ESA, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the ESAA. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the ESA, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40a(1a) begins with the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the ESA termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs

voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the ESA.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

22 I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtiger* described, at p. 1003, the object of the ESA as being the protection of "... the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, "... an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the ESA requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

26 Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to *Côté*, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, supra, at p. 88).

28 The trial judge properly noted that, if the ESA termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the ESA would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the ESA to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the ESAA introduced s. 40a, the severance pay provision, to the ESA. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

- (3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the Bankruptcy Act (Canada) has been accepted by his creditors in the period from and

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1. *Thibodeau v. Air Canada, [2014] 3 S.C.R. 340*

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 ***Thibodeau v. Air Canada, [2014] 3 S.C.R. 340***

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

Heard: March 26, 2014;

Judgment: October 28, 2014.

File No.: 35100.

[\[2014\] 3 S.C.R. 340](#) | [\[2014\] 3 R.C.S. 340](#) | [\[2014\] S.C.J. No. 67](#) | [\[2014\] A.C.S. no 67](#) | [2014 SCC 67](#)

Michel Thibodeau and Lynda Thibodeau Appellants; v. Air Canada Respondent. And Commissioner of Official Languages of Canada Appellant; v. Air Canada Respondent.

(178 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Official languages — Breach of language rights during international carriage by air — Airline failing to provide services in French on international flights — Passengers applying to Federal Court for damages and a structural order under Official Languages Act — Whether award of damages barred by limitation of damages liability set out in the Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention") — Whether structural order appropriate — Official Languages Act, *R.S.C.*

1985, c. 31 (4th Supp.), s. 77(4) — Convention for the Unification of Certain Rules for International Carriage by Air, 2242 U.N.T.S. 309, Article 29.

Legislation — Interpretation — Conflicting legislation — Airline breaching passengers' right to services in French under Official Languages Act by failing to provide services in French on international flights — Passengers [page341] applying to Federal Court for damages under Official Languages Act — Whether award of damages barred by limitation of damages liability set out in Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention") — Whether Official Languages Act and Montreal Convention conflict or overlap — Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.), s. 77(4) — Convention for the Unification of Certain Rules for International Carriage by Air, 2242 U.N.T.S. 309, Article 29.

Summary:

In 2009, on three international flights operated by the airline and in an airport, the passengers did not receive services in the French language. They filed several complaints with the Office of the Commissioner of Official Languages against the airline, four of which were upheld. There is no dispute that the airline breached its obligations to supply services in French under s. 22 of the *Official Languages Act* (the "OLA") on the occasions giving rise to those four complaints. The passengers applied to the Federal Court under s. 77 of the OLA for damages and for structural orders in relation to the airline's breaches of their right to services in French. The airline defended against the claims for damages by relying on the limitation on damages liability set out in the *Convention for the Unification of Certain Rules for International Carriage by Air* (the "*Montreal Convention*"), which restricts the types and the amount of claims for damages that may be made against international air carriers. The Federal Court found that the passengers were entitled to both damages and a structural order, holding that although there was a conflict between the limitation on damages in the *Montreal Convention* and the power under the OLA to award damages, the latter prevailed. The Federal Court of Appeal set aside the award of damages for the three complaints about events that took place on board the flights as well as the structural order. It held that the *Montreal Convention* precluded the damages remedy and that a structural order was not appropriate.

Held (Abella and Wagner JJ. dissenting): The appeals should be dismissed.

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Per McLachlin C.J. and LeBel, Rothstein, Cromwell and Karakatsanis JJ.: The *Montreal Convention's* uniform and exclusive scheme of damages liability for international air carriers does not permit an award of damages for breach of language rights during international carriage by air. To hold otherwise would do violence to the text and purpose of the *Montreal Convention*, depart from Canada's international obligations under it and put Canada off-side a strong international consensus concerning its scope and effect. The general remedial power under the OLA to award appropriate and just remedies cannot -- and should not -- be read as authorizing Canadian courts to depart from Canada's international obligations under the *Montreal Convention*.

The claims before this Court fall squarely within the exclusion established by the *Montreal Convention*. The key provision at the core of the *Montreal Convention's* exclusive set of rules for liability is Article 29. This provision makes clear that the *Montreal Convention* provides the exclusive recourse against airlines for various types of claims arising in the course of international carriage by air. Article 29 establishes that in relation to claims falling within the scope of the *Montreal Convention*, "any action for damages, however founded" may only be brought "subject to the conditions and such limits of liability as are set out in this Convention". Articles 17 to 19 of the *Montreal Convention* establish that the carrier is liable for damage sustained: in case of an accident causing the death or bodily injury of a passenger on board the aircraft or in the course of embarking or disembarking (Article 17); in case of destruction or loss of, or of damage to, baggage while in the charge of the carrier (Article 17); in the event of the destruction or loss of, or damage to, cargo during carriage (Article 18); and for damage occasioned by delay (Article 19).

Two of the main purposes of the *Montreal Convention* are to achieve a uniform set of rules governing damages liability of international air carriers and to provide limitation of carrier liability. These purposes can only be achieved by the *Montreal Convention* if it provides the exclusive set of rules in relation to the matters that it covers. The *Montreal Convention* does not deal with all aspects of international carriage by air, but within the scope of the matters which it does address, it is exclusive in that [page343] it bars resort to other bases for liability in those areas. The *Montreal Convention's* text and purpose as well as a strong current of jurisprudence make it clear that the exclusivity of the liability scheme established under the *Montreal Convention* extends at least to excluding actions arising from injuries suffered by passengers during flight or embarkation and debarkation when those actions do not otherwise fall within the scheme of permitted claims.

The passengers' argument that the *Montreal Convention* does not limit claims for damages sought in relation to public law claims or breaches of quasi-constitutional statutes has no support in the text or purpose of the *Montreal Convention* or in the international jurisprudence. The limitation in Article 29 of the *Montreal Convention* applies to "any action" in the carriage of passengers, baggage or cargo, "for damages, however founded, whether under this Convention or in contract or in tort or otherwise". There is no hint in this language that there is any intention to exempt any "action for damages" in the carriage of passengers, baggage or cargo depending on its legal foundation, such as when a plaintiff brings forward a statutory monetary claim of a public law nature based on the breach of quasi-constitutional rights. The passengers' claims are an "action for damages" within the meaning of Article 29, as they claim damages for injuries, namely moral prejudice, pain and suffering and loss of enjoyment of their vacation, suffered in the course of an international flight. Permitting an action in damages to compensate for moral prejudice, pain and suffering and loss of enjoyment of a passenger's vacation that does not otherwise fulfill the conditions of Article 17 of the *Montreal Convention* (because the action does not relate to death or bodily injury) would fly in the face of Article 29. It would also undermine one of the main purposes of the *Montreal Convention*, which is to bring uniformity across jurisdictions to the types and upper limits of claims for damages that may be made against international carriers for damages sustained in the course of carriage of passengers, baggage and cargo. The application of the *Montreal Convention* focuses on the factual circumstances surrounding the monetary claim, not the legal foundation of it.

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The passengers' argument that the substantive scope of the *Montreal Convention* does not extend to barring claims for "standardized damages" and that their claims are of that nature must also be rejected. Even if this Court were to adopt the distinction between "individual damages" and "standardized damages" relied on in jurisprudence from the European Court of Justice, the damages sought by the passengers in this case were for damages on an individual basis, as they were geared to and depended upon the impact on the passengers of the particular breaches.

The passengers' submission that, even if their claims fall within the substantive scope of the *Montreal Convention*, they fall outside its temporal scope for cases involving personal injuries since the assignments of non-bilingual flight attendants on the relevant flights were decisions made long before the embarkation process is not well founded. The passengers were clearly within the temporal limits of the *Montreal Convention* when they suffered the breach of their language rights. Courts must focus their application of the exclusivity principle on the location or activity of the passenger when the accident or occurrence directly causing the particular injury giving rise to the claim occurred, not on some antecedent fault.

When the *OLA* and the *Montreal Convention* are properly interpreted, there is no conflict between the general remedial powers under the *OLA* and the exclusion of damages under the *Montreal Convention* and, therefore, there is no need to consider which would prevail if there were. Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies and only find that they exist when provisions are so inconsistent that they are incapable of standing together. Even when provisions overlap in the sense that they address aspects of the same subject, they are interpreted so as to avoid conflict wherever this is possible. The provisions in issue here overlap but do not conflict. They have markedly different purposes and touch on distinct subject matters. The remedial provisions of the *OLA* are part of a

larger scheme of obligations and mechanisms the object of which is to preserve and strengthen the vitality of Canada's official languages in our federal institutions. The *Montreal Convention*, in contrast, is part of an internationally agreed upon uniform and exclusive scheme addressing the damages claims in the field of international carriage by air. The remedial provisions in the [page345] *OLA* cannot be understood to be an exhaustive code that requires damages to be available in all settings and without regard to all other relevant laws. The *OLA* does not provide that damages should be granted in every case, but authorizes courts to grant "appropriate and just" remedies. The power to grant an "appropriate and just" remedy may easily be reconciled with the specific and limited exclusion of damages in the context of international air travel. A remedy is not "appropriate and just" if awarding it would constitute a breach of Canada's international obligations under the *Montreal Convention*. Accordingly, in fashioning an appropriate and just remedy under the *OLA* in a case of international carriage by air, the Federal Court must apply the limitation on damages set out in Article 29 of the *Montreal Convention*.

The passengers' submission that the quasi-constitutional status of the *OLA* prevents a harmonious interpretation of s. 77(4) of the *OLA* and of Article 29 of the *Montreal Convention* must be rejected. Section 77(4) of the *OLA*, which confers a wide remedial authority, is certainly part of a quasi-constitutional statutory scheme designed to both reflect and actualize the equality of status of English and French as the official languages of Canada and the equal rights and privileges as to their use in the institutions of Parliament and government of Canada as declared in s. 16(1) of the *Canadian Charter of Rights and Freedoms*, and it should be interpreted generously to achieve its purpose. These factors, however, do not alter the correct approach to statutory interpretation which requires that the words of a statute be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the statute and the intention of Parliament. The *OLA*, read in its full context, demonstrates that Parliament did not intend to prevent s. 77(4) from being read harmoniously with Canada's international obligations given effect by another federal statute. The proposition that Parliament, through s. 77(4), intended that courts should be able to grant damages even though doing so would be in violation of Canada's international undertakings as incorporated into federal statute law runs afoul of the principle of interpretation that Parliament is presumed not to intend to legislate in breach of Canada's international law obligations. Section 77(4) should be understood as having been enacted into an existing legal framework which [page346] includes statutory limits, procedural requirements and a background of general legal principles -- including Canada's international undertakings incorporated into Canadian statute law -- which guide the court in deciding what remedy is "appropriate and just".

The Federal Court of Appeal was correct to set aside the structural order. Structural orders are treated with special care because of two potential and related problems: first, insufficient clarity, which in turn may result in the second, namely the need for ongoing judicial supervision. Orders must be sufficiently clear so that they give the parties bound by them fair guidance on what must be done to comply and to prevent a potentially endless round of further applications to determine whether the parties have complied. Ongoing judicial supervision will be appropriate in some cases, but absent compelling circumstances, the courts generally should not make orders that have the almost inevitable effect of creating ongoing litigation about whether the order is being complied with. In this case, the order is too imprecise, risks ongoing litigation and court supervision in relation to whether it is being complied with, and is inappropriate particularly in light of the Commissioner's statutory powers and expertise in relation to monitoring compliance with the *OLA*.

Per Abella and Wagner JJ. (dissenting): The *Montreal Convention* does not bar a damage award for breach of language rights during international carriage by air.

The Ts seek damages for violations of a statute that reifies constitutionally protected rights. The *Montreal Convention* should be interpreted in a way that is respectful of the protections given to fundamental rights, including language rights, in domestic legislation. There is no evidence in the Parliamentary record or the legislative history of the *Convention* to suggest that Canada, as a state party, intended to extinguish domestic language rights protection by ratifying or implementing the *Montreal Convention*. Given the significance of the rights protected by the *Official Languages Act* and their constitutional and historic antecedents, the *Montreal Convention* ought to be interpreted in a way that respects Canada's express

commitment to these fundamental rights, rather [page347] than as reflecting an intention to subvert them. This Court has often said that domestic law should be generously interpreted in alignment with international law and its human rights values. It has never said that international law should be interpreted in a way that diminishes human rights protected by domestic law.

The process of treaty interpretation is a process of discernment. The literal meaning of the words is rarely reliably able to yield a clear and unequivocal answer. The intention of state parties must therefore be discerned by using a good faith approach not only to the words at issue, but also to the context, history, object and purpose of the treaty as a whole. In this case, this exercise leads to the conclusion that Article 29 of the *Montreal Convention* does not exclusively govern the universe of damages for which carriers are liable during international carriage by air. The first words of Article 29 are words that restrict its scope by declaring that any action for damages "[i]n the carriage of passengers, baggage and cargo" must be brought subject to the conditions set out in the *Montreal Convention*. The phrase that immediately follows --"however founded, whether under this Convention or in contract or in tort or otherwise" -- is a clause dependant for its meaning on the preceding opening words; thus, "action" refers only to an action for damages "[i]n the carriage of passengers, baggage and cargo". It is, therefore, only an action for damages incurred "[i]n the carriage of passengers, baggage and cargo" that must be brought "subject to the conditions and such limits of liability as are set out" in the *Montreal Convention*.

Other provisions of the *Montreal Convention*, and, in particular, of Chapter III in which Article 29 is found, provide interpretive assistance to assess the meaning of an action for damages "[i]n the carriage of passengers, baggage and cargo". Chapter III sets out the limited liability of carriers in the carriage of passengers, baggage and cargo. Articles 17, 18 and 19 refer to death or bodily injury of a passenger, destruction or loss of, or damage to, baggage, destruction or loss of, or damage to, cargo, and delay in the carriage of persons, baggage or cargo. Together with Article 29, these provisions confirm that the *Montreal Convention* exclusively governs only actions for damages in respect of these subjects.

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The predecessor *Warsaw Convention* came into being in 1929 to assist the fledgling airline industry take flight. At that time, aviation technology was in its initial stages. Accidents were common, and many pilots and passengers were injured or died as a result. The relative frequency of accidents exposed carriers to unpredictable and significant losses. This made it difficult to secure investment capital or insurance protection. Airlines responded by requiring passengers to sign waivers relieving carriers of any and all liability in the event of an injury. When accidents happened, those passengers were left with no remedy for their injuries or losses. As safety in the industry improved, governments turned their attention from protecting the financial viability of airlines to introducing a more passenger-friendly legal regime. The focus tilted towards increasing the exceptionally low limits on carrier liability established in the *Warsaw Convention* and states subsequently signed on to different international efforts to expand carrier liability.

Notwithstanding the increasing recognition that compensation for passengers was too low, a single international instrument increasing ceilings on carrier liability proved elusive. Out of concern that this fractured response could lead to the demise of a unified system of international air law, the industry took action. The *Montreal Agreement* of 1966, a private arrangement between airlines, increased carrier liability under the *Warsaw Convention* for personal injury.

Having been "upstaged" by industry initiatives to address the low ceilings on carrier liability, states began to work towards updating the *Warsaw Convention*. The *Montreal Convention* came into being in 1999, adopting a two-tier liability scheme for passenger injury or death. The *Montreal Convention* sought to replace the patchwork system that had attempted to expand the limits on liability set by the *Warsaw Convention* in 1929. The drafters of the *Montreal Convention* continued to maintain a uniform liability scheme, as had the *Warsaw Convention*, but while the primary goal of the *Warsaw Convention* had been to limit the liability of carriers in order to foster the growth of the nascent commercial aviation industry, the state parties to the *Montreal Convention* were more focused on the importance of ensuring protection of the interests of consumers in international [page349] carriage by air and the need for equitable compensation based on the

principle of restitution.

Interpreting Article 29 of the *Montreal Convention* in a way that narrows protection for consumers and expands it for carriers, is therefore both counter-intuitive and historically anomalous. At no time was there ever any suggestion that the new *Convention* was designed to *reduce* the ability of passengers to sue carriers.

The absence of any reference in the Parliamentary record to the changes in language between the *Warsaw Convention* and the *Montreal Convention* is also revealing. Dramatic changes in law tend to attract dramatic reactions. This purported change attracted none. The most logical explanation for the silence, therefore, is that there was no change in law. In fact, it is hard to imagine such a drastic domestic intrusion without either express language or Parliamentary disclosure. The silence about such consequences suggests that no such consequence was either contemplated or intended.

The meaning of Article 29, considered in context and in light of the object and purpose of the *Montreal Convention*, therefore, points to a limited scope of exclusivity, and should be interpreted as directing that the *Montreal Convention* governs only those actions brought for damages incurred "[i]n the carriage of passengers, baggage and cargo", namely, actions covered by Articles 17, 18 and 19.

The T's action for damages does not fall within the actions covered by Articles 17, 18 and 19 of the *Montreal Convention*. The language of Article 17(1) makes it clear that the provision does not apply to all events that take place on board an aircraft or in the course of the operations of embarking or disembarking. Rather, Article 17(1) imposes the requirements that: (1) there must have been an accident, (2) which caused, (3) death or bodily injury, (4) while the passenger was on board the aircraft or was in the course of embarking or disembarking. In this case, there is no complaint of an accident. That is dispositive since Article 17(1) talks of "death or bodily injury" caused by an accident. The T's have not [page350] suffered any bodily injury. The fact that the breaches of their language rights occurred on board the aircraft is irrelevant since those circumstances are only pertinent if there was an accident.

The appeals should be allowed with respect to the claims for damages and the damages awarded by the application judge should be restored.

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History and Disposition:

APPEALS from a judgment of the Federal Court of Appeal (Pelletier, Gauthier and Trudel J.J.A.), 2012 FCA 246, [2013] 2 F.C.R. 155, 435 N.R. 131, 355 D.L.R. (4th) 62, [2012] F.C.J. No. 1201 (QL), 2012 CarswellNat 3578, setting aside in part a decision of Bédard J., 2011 FC 876, [2013] 2 F.C.R. 83, 394 F.T.R. 160, 239 C.R.R. (2d) 301, [2011] F.C.J. No. 1030 (QL), 2011 CarswellNat 6095. Appeals dismissed, Abella and Wagner J.J. dissenting.

Counsel

Érik Labelle Eastaugh, Ronald F. Caza and Alyssa Tomkins, for the appellants Michel and Lynda Thibodeau.

Pascale Giguère, Kevin Shaar and Mathew Croitoru, for the appellant the Commissioner of Official Languages of Canada.

Louise-Hélène Sénécal, Pierre Bienvenu and Andres Garin, for the respondent.

The judgment of McLachlin C.J. and LeBel, Rothstein, Cromwell and Karakatsanis JJ. was delivered by

CROMWELL J.

I. Introduction

1 Air Canada failed to provide services in French on some international flights as it was obliged to do under the *Official Languages Act*, *R.S.C. 1985, c. 31 (4th Supp.)* (the "OLA"). Two passengers, the [page355] appellants Michel and Lynda Thibodeau, applied to the Federal Court for damages and for orders, referred to as "structural" or "institutional" orders, requiring Air Canada to take steps in order to ensure future compliance with the OLA. The airline defended against the claims for damages by relying on the limitation on damages liability set out in the *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 U.N.T.S. 309 (the "*Montreal Convention*"), which is part of Canadian federal law by virtue of the *Carriage by Air Act*, *R.S.C. 1985, c. C-26*, a federal statute.

2 The Federal Court rejected Air Canada's defence, awarded damages and granted a structural order (*2011 FC 876*, [2013] 2 F.C.R. 83). However, the Federal Court of Appeal set that ruling aside in part, holding that the *Montreal Convention* precluded the damages remedy for the events that took place on board Air Canada flights and that a structural order was not appropriate (*2012 FCA 246*, [2013] 2 F.C.R. 155). The main issue on the further appeal to this Court is whether the Federal Court of Appeal erred in these conclusions.

3 The issue of damages sits at the intersection of Canada's domestic commitment to official languages and its international commitment to an exclusive and uniform scheme of damages liability for international air carriers. The question thus implicates two important values.

4 On one hand, we have Canada's duty to comply with its international undertaking, by its ratification of the *Montreal Convention* and its adoption of the *Montreal Convention* into domestic law, to establish and give effect to limitations on liability for international air carriers. Air Canada maintains that upholding a damages remedy against the airline would be inconsistent with this important international undertaking. On the other hand, we [page356] have Canada's foundational commitment to the equality of the French and English languages, a commitment reflected, among other places, in s. 16 of the *Canadian Charter of Rights and Freedoms* and in the OLA. These language rights are "basic to the continued viability of [this] nation": *R. v. Mercure*, [1988] 1 S.C.R. 234, at p. 269,

80 The Thibodeaus further submit that the substantive scope of the *Montreal Convention* does not extend to barring claims for "standardized damages" and that their claims are of that nature. This argument relies on jurisprudence from the European Court of Justice, in particular *International Air Transport Association v. Department for Transport*, C-344/04, [2006] E.C.R. I-403 (Grand Chamber) ("*IATA*"), which was followed by the Fourth Chamber of the European Court of Justice in *Wallentin-Hermann v. Alitalia*, C-549/07, [2008] E.C.R. I-11061, at para. 32, and *Sturgeon v. Condor Flugdienst GmbH*, Joined Cases C-402/07 and C-432/07, [2009] E.C.R. I-10923, at para. 65, and reaffirmed by the Grand Chamber in *Nelson v. Deutsche Lufthansa AG*, Joined Cases C-581/10 and C-629/10, [2013] 1 C.M.L.R. 42 (p. 1191), at paras. 46-60. In the *IATA* case, for example, the question was whether a European Community regulation dealing with air passengers' rights in the event of delay was inconsistent with the *Montreal Convention*. The regulation required airlines to provide assistance to delayed passengers ranging from free meals and refreshments to free hotel accommodation. The court concluded that passenger delay gives rise to two distinct types of damage, only one of which is governed by the *Montreal Convention*. The first, which in the court's view is *not* addressed by the *Montreal Convention*, is "damage that is almost identical for every passenger, [page385] redress for which may take the form of standardised and immediate assistance or care for everybody concerned": para. 43. This, in the court's view, was the sort of measure contained in the regulation. The second, which *is* subject to the *Montreal Convention*, is "individual damage ... redress for which requires a case-by-case assessment of the extent of the damage caused": *ibid*.

81 In my respectful view, this line of jurisprudence is not relevant to the issue that confronts us here. Even if we were to adopt the distinction between "individual damages" and "standardized damages" relied on by the European Court of Justice, it would not assist the Thibodeaus. The damages which they seek in this case cannot be described as "damage ... redress for which may take the form of standardised and immediate assistance or care for everybody concerned" as were the measures required by the regulation considered in *IATA*. The damages as claimed by the Thibodeaus and as awarded by the application judge were, at least in part, geared to and depended upon the impact on the Thibodeaus of the particular breaches. Their claims were for damages on an individual basis.

82 I note that the Supreme Court of the United Kingdom recently understood the *IATA* line of jurisprudence in the same way. The court held that a claim for damages for breach of duties owed to disabled persons was a claim for damages on an individual basis and therefore the *IATA* line of jurisprudence did not assist the claimant's attempt to escape the bar set out in the *Montreal Convention*: *Stott*, at para. 58. I respectfully agree and would apply the same reasoning here.

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(c) *The Appellants' Claims Do Not Fall Within the Temporal Scope of the Montreal Convention's Limitations*

83 Mr. and Ms. Thibodeau submit that, even if their claims fall within the substantive scope of the *Montreal Convention*, they nonetheless fall outside its temporal scope for cases involving personal injuries. Article 17 of the *Montreal Convention* deals with personal injuries suffered "on board the aircraft or in the course of any of the operations of embarking or disembarking". Mr. and Ms. Thibodeau argue that the assignments of non-bilingual flight attendants on the relevant flights by Air Canada were decisions made long before the embarkation process and were, as the application judge found, the result of systemic problems within the management of the airline. Thus, they submit, the failure to provide French language services did not occur "on board the aircraft or in the course of any of the operations of embarking or disembarking".

84 This submission is not well founded and I cannot accept it.

85 The Supreme Court of the United Kingdom rejected a similar argument, in my view correctly, in *Stott*. The appellant in that case argued that he "had a complete cause of action before boarding the aircraft based on his

poor treatment prior to that stage": para. 60. The court rightly held that, by this logic, "most accidents or mishaps" could be "traced back to earlier operative causes" and that such an approach to the *Montreal Convention* "would distort [its] broad purpose": *ibid*. Rather, courts must focus their application of the exclusivity principle on the location or the activity of the passenger when the accident or occurrence directly causing the particular injury giving rise to the claim occurred, not on some antecedent fault: *ibid*. See also Dempsey, at pp. 439-41; *Shawcross and Beaumont*, at pp. VII-685 to VII-687.

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86 In this case, the Thibodeaus were clearly within the temporal limits of the *Montreal Convention* when they suffered the breach of their language rights; they were aboard the aircraft for the three breaches for which damages were set aside by the Court of Appeal. I therefore reject the Thibodeaus' submission based on the temporal aspect of Article 17 of the *Montreal Convention*.

(d) *Conclusion*

87 The claims before this Court fall squarely within the exclusion established by the *Montreal Convention*.

B. *Are Mr. and Ms. Thibodeau Nonetheless Entitled to Monetary Damages Because the OLA and the Montreal Convention Conflict and the OLA Prevails?*

(1) Introduction

88 I have concluded that if the *Montreal Convention* applies, it bars the Thibodeaus' claims for damages under the *OLA*. The appellants say, however, that even if this is so, the *Montreal Convention* conflicts with the *OLA* and that the *OLA* prevails. They submit that the power of the Federal Court under s. 77(4) of the *OLA* to "grant such remedy as it considers appropriate and just in the circumstances" conflicts with the exclusion of actions for damages under the *Montreal Convention*. The first question therefore is whether these provisions conflict. I agree with the Federal Court of Appeal that they do not.

89 Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies and only find that they exist when provisions are so inconsistent that they are incapable of standing together. Even where provisions overlap in the sense that they address aspects of the same [page388] subject, they are interpreted so as to avoid conflict wherever this is possible.

90 When we apply these principles, we see that the provisions in issue here do not conflict. They have markedly different purposes. The remedial provisions in the *OLA* cannot be understood to be an exhaustive code that requires damages to be available in all settings and without regard to all other relevant laws. Moreover, the power to grant an "appropriate and just" remedy may easily be reconciled with the specific and limited exclusion of damages in the context of international air travel. A remedy is not "appropriate and just" if awarding it would constitute a breach of Canada's international obligations under the *Montreal Convention*.

(2) What Is "a Conflict"?

91 The appellants contend that there is a conflict between two acts of the same legislature. The *Carriage by Air Act*, incorporating the *Montreal Convention*, purports to preclude an award of damages while s. 77(4) of the *OLA* permits the court to grant an "appropriate and just" remedy, including damages. In short, the appellants' position is that the exclusion of damages during international air travel conflicts with the power to award an "appropriate and just" remedy.

92 The legal framework that governs this question is not complicated. First, courts take a restrictive approach to what constitutes a conflict in this context. Second, courts find that there is a conflict only when the existence of the

conflict, in the restrictive sense of the word, cannot be avoided by interpretation. Overlap, on its own, does not constitute conflict in this context, so that even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply, provided that they can do so without producing absurd results. This presumption may be rebutted if one of the provisions was intended to cover the subject matter exhaustively. Third, only where a conflict [page389] is unavoidable should the court resort to statutory provisions and principles of interpretation concerned with which law takes precedence over the other. This case turns on the first two of these principles and I will explore them in somewhat more detail.

93 Courts presume that "the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 325; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 30. This is sometimes expressed as a presumption of coherence, based on the common sense idea that the legislature does not intend to make contradictory enactments: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 38. This is why courts take a very restrictive approach to defining what constitutes a conflict: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 375.

94 What then is a conflict in this context? The provisions must be "so inconsistent with ... or repugnant" to each other that they are "incapable of standing together": *Daniels v. White*, [1968] S.C.R. 517, at p. 526; *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488, at pp. 491 and 499; *Canadian Westinghouse Co. v. Grant*, [1927] S.C.R. 625, at p. 630; *International Brotherhood of Electrical Workers v. Town of Summerside*, [1960] S.C.R. 591, at pp. 598-99; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489, at paras. 41-45. Application of one provision "must implicitly or explicitly preclude application of the other": P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350, adopted by the Court in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47; see also Côté (4th ed.), at p. 376.

[page390]

95 Bastarache J. held in *Lévis* that "[u]navoidable conflicts ... occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results": para. 47. It is not an absurd result to exclude one particular remedy - damages - in the particular context of international air travel. Therefore, the live issue here is whether the provisions are directly contradictory.

96 A "direct contradiction" exists if the application of one law excludes the application of the other. For example, in *Massicotte v. Boutin*, [1969] S.C.R. 818, one statute allowed for an extension of time only before the time limit expired, while another statute allowed for an extension to be granted even after the time limit had expired. There was thus a direct conflict between the two laws with respect to an application for an extension of time sought after the time limit had expired: p. 820. Similarly, in *Lévis*, one provision required dismissal of a police officer who has been convicted of a criminal offence while another provision allowed the officer to retain the position upon showing special circumstances. As Bastarache J. put it, one enactment said yes while the other said no: paras. 48-49.

97 This is not the situation that faces us here. The *OLA* does not provide that damages should be granted in every case, but authorizes courts to grant "appropriate and just" remedies. The exclusion of a damages remedy in the context of international air travel is thus not a direct contradiction of the remedial power under the *OLA*.

98 This case is therefore not one of direct contradiction but of overlap. The *OLA*'s broad and discretionary remedial provisions permit an award of damages where that is what the court considers to be an appropriate and just remedy in the circumstances. The *Montreal Convention*, on the [page391] other hand, restricts claims for damages by passengers in the context of international air travel. Overlapping provisions, however, do not necessarily conflict. Laws do not conflict simply because "they overlap, are active in the same field or deal with the same subject matter": Côté (4th ed.), at p. 376; *Toronto Railway*, at p. 499. If the overlapping laws can both

apply, it is presumed that they are meant to apply, and "[t]he only issue for the court is whether the presumption is rebutted by evidence that one of the provisions was intended to provide an exhaustive declaration of the applicable law": Sullivan, at p. 326.

99 Courts strive through interpretation to avoid finding that overlapping provisions conflict. As Bastarache J. said in *Lévis*, "an interpretation which results in conflict should be eschewed unless it is unavoidable" (para. 47). Courts are therefore slow to find that broadly worded provisions were intended to be an exhaustive declaration of the applicable law where the result of that conclusion creates rather than avoids conflict. For example, when overlapping provisions have different purposes or touch on different aspects, they will generally not be found to conflict: Sullivan, at p. 328. As Professor Côté explains, the court must consider the purpose of the law in order to determine whether in the circumstances the enactment of one norm may be interpreted as excluding all others: 4th ed., at pp. 379-80.

100 To pause here for a moment, the two allegedly conflicting laws in this case have markedly different purposes and touch on distinct subject matters. The remedial provisions of the *OLA* are part of a larger scheme of obligations and mechanisms the object of which is to preserve and strengthen the vitality of Canada's official languages in our federal institutions. It applies to only one airline, Air Canada. The *Montreal Convention*, in contrast, is part of an internationally agreed upon uniform and exclusive scheme addressing damages claims in [page392] the field of international carriage by air. Given these two dramatically different purposes and spheres of operation, we should be slow to find a conflict in the narrow point at which the schemes overlap. It will be helpful to review briefly three judgments of this Court dealing with overlapping provisions in order to see how these principles play out in specific cases.

(3) The Jurisprudence

101 In *The King v. Williams*, [1944] S.C.R. 226, Mr. Williams was fined as a result of his conviction under the *Foreign Exchange Control Order*, P.C. 7378, made under the *War Measures Act*, R.S.C. 1927, c. 206, for attempting to export a quantity of gold from Canada without a licence. When he was pursued for forfeiture of the gold, he argued that the exportation of gold was addressed under *The Gold Export Act*, S.C. 1932, c. 33, which did not provide for forfeiture. It followed, he argued, that forfeiture was not available in the case of exporting gold contrary to the *Foreign Exchange Control Order*. The submission in effect was that *The Gold Export Act* dealt exhaustively and exclusively with the consequences of attempting to export gold from Canada. That position was rejected by a majority of the Court. The point is perhaps made most clearly in the concurring reasons of Hudson J., at p. 240:

In the present case there is no repugnancy. Two measures were passed for different purposes and are to be enforced through different organs of the Government. The *Foreign Exchange Control Order* is very comprehensive, covering the whole field of currency, securities and commodities. I do not think that the Court could properly imply an intention to exclude from "currency" gold coins and from "commodities" fine gold, which nominally determines the value of all currency and monetary obligations. [Emphasis added.]

[page393]

102 There is a clear parallel between *Williams* and this case. The two provisions were enacted for very different purposes, as I discussed earlier. The *Montreal Convention* is a "very comprehensive" scheme in relation to claims for damages in the field of international carriage by air. The remedial provisions in the *OLA*, by contrast, are very generally worded and cannot realistically be thought to mandate that damages must be available for every breach. Following the reasoning of *Williams*, there is no "repugnancy" between the two provisions.

103 In *Myran v. The Queen*, [1976] 2 S.C.R. 137, a memorandum of agreement with the force of statute assured the appellants, who were Treaty Indians, that they would have the right of hunting, trapping and fishing for food on all unoccupied Crown lands (and certain other lands). However, another statute made it an offence to hunt without

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Document (1)

1. *McMillan v. Thompson (Rural Municipality), [1997] M.J. No. 67*

Client/Matter: -None-

Search Terms: 2005 McMillan v Thompson (Rural Municipality)MBCA 55

Search Type: Natural Language

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 ***McMillan v. Thompson (Rural Municipality), [1997] M.J. No. 67***

Manitoba Judgments

Manitoba Court of Appeal

Philp, Helper and Kroft JJ.A.

Heard: November 20, 1996.

Judgment: February 10, 1997.

Suit Nos. AI 96-30-02846 and AI 96-30-02847

[1997] M.J. No. 67 | [144 D.L.R. \(4th\) 53](#) | [\[1997\] 3 W.W.R. 1](#) | [115 Man.R. \(2d\) 2](#) | [40 C.C.L.I. \(2d\) 147](#)
| [32 C.C.L.T. \(2d\) 1](#) | [37 M.P.L.R. \(2d\) 41](#) | [69 A.C.W.S. \(3d\) 345](#)

Between David William Meek, (plaintiff) respondent, and The Rural Municipality of Thompson, (defendant) appellant And between Brian McMillan, (plaintiff) respondent, and The Rural Municipality of Thompson, (defendant) appellant, and David William Meek, (third party) respondent

(56 pp.)

Trial decision reported at [\(1996\) 111 Man.R. \(2d\) 11](#).

Case Summary

Practice — Pleadings — Striking out pleadings — Grounds, where compensation paid out of consolidated revenue fund — Insurance — Automobile insurance, compulsory government schemes — Liability coverage — Policy limits, use or occupation of motor vehicle.

This was an appeal from a dismissal of an application to strike a negligence action. The respondent, McMillan, was injured in an automobile accident. His vehicle fell through a washed-out bridge maintained by

the appellant municipality. There were no warnings of danger. McMillan brought an action against the municipality on the basis that it was negligent for failing to maintain the bridge and for failing to warn users of possible danger. The municipality argued that the accident was subject to a comprehensive no-fault public auto insurance scheme and that the action was therefore barred. The municipality's application to strike the action was dismissed on the ground that the accident was not caused by the use of an automobile and was not considered by the insurance scheme. The municipality contended that the chambers judge erred by giving an overly narrow scope to the applicability of the insurance scheme.

HELD: The appeal was allowed.

The action was struck. The chambers judge erred in considering whether McMillan's injuries were caused by something other than an automobile. The insurance scheme compensated for all injuries incurred in the ordinary use of an automobile. McMillan was injured while operating his automobile.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, R.S.O. 1960, c. 172, s. 147(1).
Insurance (Motor Vehicle) Act, R.S.B.C. 1979, c. 204.
Insurance (Motor Vehicle) Regulations, *B.C. Reg. 447/83, s. 79(1)*.
Interpretation Act, R.S.M. 1987, c. I-80, s. 12.
Manitoba Public Insurance Act, S.M. 1993, c. 36, s. 5.
Manitoba Public Insurance Act, R.S.M. 1987, c. P-215, ss. 71(1), 71(2), 72, 73, 74, 75, 76, 77, 78, 79, 80.
Manitoba Railway Act, R.S.M. 1913, c. 168, s. 116.
Motor Vehicle (Third Party Insurance) Act 1943 (W.A.), ss. 4(1), 6(1)(b), 7(1), 8(1), 70(1), 79(1).
Municipal Act, R.S.M. 1988, c. M-225, s. 231(1), 232.
Personal Injuries (Emergency Provisions) Act, 1939, (U.K.).
Railway Act, s. 83.
Vehicles Act, S.S. 1945, s. 141(1).

Counsel

R.D. McDonald and E.V. Murray, for the appellant. D.K. Paterson, for the respondent Meek. H.I. Pollock, Q.C. and B.P. Schwartz, for the respondent McMillan. K.M. McCulloch and J.G. McKelvey, for the intervenor M.P.I.C.

Separate reasons for judgment were delivered by Philp, Helper and Kroft JJ.A.

PHILP J.A.

1 I have had the privilege of reading the reasons of my colleague, Justice Helper. I am indebted to her for her analysis of this difficult issue, and I concur in the result she has reached. I wish to add only a brief review of the principal reasons for my concurrence.

41 Section 72 acknowledges the potential conflict between the provisions of Part 2 and other existing legislation. It states that Part 2 is to "stand in lieu of all rights and remedies arising out of bodily injuries" to which the enactment applies. No action for compensation for bodily injuries to which Part 2 of The M.P.I.C. Act applies "may be admitted before any court." Throughout Part 2, s. 72 is described as the "no tort claims" section.

42 Section 73 provides that compensation is payable without any consideration of fault. The concept of fault is eliminated entirely from the scheme of compensation.

43 Sections 74 to 80 inclusive deal with the corporation's limited rights of subrogation, the rights of Manitobans when accidents occur outside the province, actions against non-residents and other incidental rights or exclusions.

The Argument

44 The appellant contends that the motions judge erred in failing to consider and review both the 1988 report of the Autopac Review Commission (the Report) prepared by Robert Kopstein P.J. to which Part 2 of The M.P.I.C. Act was a response and the legislative debates which preceded the enactment of Part 2.

45 The motions judge did, however, admit that evidence. He found that he was not required to examine it because his interpretation of the legislation depended on the wording of the enactment and not upon the contents of the debates and the Report. He followed the dicta laid down in *Morguard Properties Ltd. et al. v. City of Winnipeg*, [1983] 2 S.C.R. 493 at p. 498:

It has, of course, been long settled that, in the interpretation of a statute ... the report of a commission of inquiry such as a Royal Commission may be used in order to expose and examine the mischief, evil or condition to which the Legislature was directing its attention. However, in the interpretation of a statute, the court, according to our judicial philosophy, may not draw upon such reports and commentaries, but must confine itself to an examination of the woe employed by the legislature in the statutory provision in question and the context of that provision within the statute.

46 Each of the parties referred extensively to the Report to highlight one or other of the identified objectives of the legislation in order to persuade this Court that a particular interpretation of the words used in the definition section is warranted.

47 The appellant's submission is that Part 2 was enacted with the objective of eliminating all litigation in circumstances where injuries are the result of an automobile accident. In enacting Part 2, the legislature was reacting to the inequities which may develop during the course of litigation, to the expense associated with the use of the judicial system, to the delays encountered by litigants in receiving compensation, to the uncertainty visited upon the litigants, and to the unevenness of awards. It contends that the objective was to provide an egalitarian system of compensation for all accident victims regardless of fault, to reduce the burden upon the court and to speed the recovery process for all victims.

48 The appellant argues as well that the motions judge erred in applying a restrictive interpretation to the phrase "caused by" used in the definition section of Part 2. It says that neither the language chosen by the legislators, nor the objectives of the legislation call for a restricted interpretation of those words.

49 Finally, the appellant contends that the motions judge erred in his application of the jurisprudence to the question he was required to answer.

50 The respondents reply that the legislative objective in enacting Part 2 was to reduce the costs of providing automobile insurance coverage to Manitobans; that is, to introduce greater control over rising insurance premiums and to reduce the escalating costs to the M.P.I.C overall. The new scheme is not a pure no-fault plan. By using

the more restrictive phrase "caused by" in the definition section rather than the phrase "arising out of," the legislature clearly intended the plan to apply narrowly in keeping with its objectives. Where accidents are the fault of negligent third parties, Part 2 has no application and victims have the right to sue in the ordinary way for damages.

The Decision

The Legislative Objective

51 In arriving at my decision, I reviewed those parts of the Report to which the Court was directed. That review caused me to conclude that Part 2 was enacted to address not any one, but rather many different perceived "evils." The evidence reveals the extent of the study conducted by the legislators prior to enacting Part 2, the exposure of the members to the particulars of other existing systems and the concerns or satisfaction that had been acknowledged in the operation of those other systems. Ultimately, however, the interpretation of s. 70(1) depends upon the words chosen by the legislators in the context of the enactment as a whole. The jurisprudence which addresses the interpretation of similarly worded clauses found in private insurance policies or the like may prove instructive, but is not determinative of the issue.

52 The evidence indicates that the Quebec plan, a "pure no-fault system" which has been in existence since 1978, was reviewed by Kopstein P.J. and referred to by the legislators. There can be little doubt that the Manitoba legislation was modelled on the Quebec plan. It is worded similarly, but is not identical to that plan. Just as the jurisprudence dealing with the interpretation of similarly-worded phrases in private insurance plans may prove instructive for the interpretation of the Manitoba scheme, so too the jurisprudence which has developed under the Quebec plan may prove instructive in determining the correct interpretation of the critical words in the Manitoba legislation. However, that jurisprudence is not binding upon this Court and is not conclusive of the issue. I repeat that an examination of the particular words used in s. 70(1) and in the related provisions of the enactment provide the best guide for the correct interpretation and application of Part 2.

53 I also looked to s. 12 of The Interpretation Act, R.S.M. 1987, c. 180 for guidance:

Every enactment shall be deemed remedial, and shall be given such fair, large, and liberal construction and interpretation as best insures the attainment of its objects.

54 I have concluded that the legislature created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile. I find favour with the observations of Pitt J. in the case of *The Economical Mutual Insurance Co. v. Lott* [1995] I.L.R. 1-3213 (Ont. G.D.):

I am of the view that the main objective of motor vehicle insurance legislation in the nineties is the reduction in the volume and costs of litigation. The means to achieve that objective is the limitation of access to the courts. For that reason alone I would agree with the observations of Matlow J. in *Canadian General Insurance Co. v. Jevco Insurance Co.*, dated October 21, 1994, that: the no-fault provisions of the Act were intended to constitute a comprehensive code determining the rights of insured persons against their insurers and the rights of insurers against other insurers.

55 What other intent can be attributed to the legislature when you examine the definition in the context of the scheme as a whole?

The Phrase "Caused By"

56 The legislated scheme is focused on injuries. It is not directed to accidents, nor to the cause of accidents. That focus is clear in s. 70(1). Section 72, which eliminates the concept of fault, supports that conclusion. The legislative emphasis on the injuries suffered by a victim, and its failure to refer at all to the cause of an accident,

are important factors to consider in interpreting the phrase "caused by" and in determining the scope of the scheme.

57 Black's Law Dictionary, 6th ed., defines "cause" as: to be the cause or occasion of; to effect as an agent; to bring about; to bring into existence; to make to induce.

58 "Cause of injury" is defined in that same text as "That which actually produces it."

59 Shorter Oxford English Dictionary and The Dictionary of Canadian Law, Dukelow & Nuse, Carswell (1991), defines "cause" similarly.

60 The motions judge found that the words "caused by the use of an automobile" are plain and unambiguous and on that basis rejected the appellant's argument that the legislature intended to include injuries which are received in association with the use of an automobile regardless of whether the accident is caused in whole or in part by something other than an automobile.

61 He found support for his conclusion that the words "caused by" must be given a restricted meaning in the reasons of Major J. in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405. I will return to a discussion of that case later in these reasons.

62 In my view, the motions judge placed an unnecessarily restrictive interpretation on the phrase "caused by," an interpretation that is inconsistent with both the ordinary meaning of those words and the spirit of the legislation. A restrictive interpretation is also contrary to current jurisprudence.

63 The legislature included in the definition of "bodily injury caused by an automobile," an injury caused by a load or a trailer. Clearly, the legislative intent was to include in the insurance scheme compensation for all injuries which are incurred in the ordinary use of a automobile. Neither a load nor a trailer, on its own, can "cause" an injury. However, if a load being hauled by automobile in the ordinary use of that automobile is not properly secured, an accident resulting in injury could ensue. Some examples come to mind.

64 In example one, a driver secures his load improperly. The load shifts during the course of travel causing the driver to lose control of his vehicle resulting in a injury to both himself and to his passenger. In the second example, the resulting injuries are the same, but on this occasion, it is a third party, not the driver, who improperly secures the load. In the third example, the improperly secured load extends beyond the dimensions of the automobile or comes free from the automobile and causes injury to a innocent bystander.

65 To accept the respondents' submission and the motions judge's determination that in each example the proximate cause of the accident must be determined because the legislators chose to use the words "caused by" rather than "arising from" an automobile or use of a automobile could result in each of the above-noted victims having different remedies.

66 In the first example, Part 2 would apply for the benefit of the driver who would be entitled to immediate compensation. However, his passenger would be required to sue him because it was the driver's negligent securing of the load which caused the accident. In the second example, both the driver and his passenger would be required to sue the negligent third party who secured the load because the proximate cause of the accident was the negligence of that third party. In the last example, the innocent bystander would be required to sue the driver or the person who negligently loaded the automobile or both because it was the negligent securing of the load which caused the accident. For the sake of simplicity, I have avoided any reference to the potential for claims of contributory negligence.

67 Surely the legislation is to be interpreted in a manner that results in equality and equity. A restrictive interpretation of the words "caused by" would defeat many of the objectives identified by the legislators prior to the introduction of the enactment: the introduction of a simplified insurance scheme, the elimination of litigation for

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Document (1)

1. *Coalition of Manitoba Motorcycle Groups Inc. v. Manitoba (Public Utilities Board), [1995] M.J. No. 301*

Client/Matter: -None-


Search Terms: [1995] 102 Man R (2d) 155

Search Type: Natural Language

Narrowed by:

Content Type
CA Cases

Narrowed by
-None-

 ***Coalition of Manitoba Motorcycle Groups Inc. v. Manitoba (Public Utilities Board), [1995] M.J. No. 301***

Manitoba Judgments

Manitoba Court of Appeal

Twaddle, Helper and Kroft JJ.A.

Heard: April 7, 1995.

Judgment: July 25, 1995.

Suit No. AI 93-30-01563

[1995] M.J. No. 301 | 102 Man.R. (2d) 155 | 32 C.C.L.I. (2d) 46 | 56 A.C.W.S. (3d) 1088

Between The Coalition of Manitoba Motorcycle Groups Inc., appellant, and The Public Utilities Board, and The Manitoba Public Insurance Corporation, respondent, and The Manitoba Society of Seniors Inc. and The Consumers Association of Canada (Manitoba) Inc., intervenors

(12 pp.)

Case Summary

Public utilities — Public utilities commissions — Regulation, rates — Power to fix just and reasonable rates — Practice and procedure — Notice of hearing — Right to fair hearing.

This was an appeal from an order by the Public Utilities Commission approving rates to be charged by the Manitoba Public Insurance Corporation for motorcycle insurance. At issue were whether the Public Utilities Board could approve rates higher than those sought by the Insurance Corporation and whether it had denied natural justice to the appellant by failing to give it a fair and full hearing. Seven days of public hearings had been held in 1993. The insurance corporation had sought no increase, on a policy basis, despite that

evidence one was needed. This was because of public expectation that decreases should result from the implementation of a no fault scheme. This violated actuarial soundness. The Board approved a 15 per cent increase. It held a rehearing in 1994. The appellant was concerned about limited time to prepare and asked the increase be suspended. No adjournment or extension was requested.

HELD: The appeal was dismissed.

The Board could approve a rate different from that proposed by the Corporation. The notice of the rehearing was adequate in the circumstances.

Statutes, Regulations and Rules Cited:

Crown Corporations Public Review and Accountability Act, S.M. 1988-89, c. 23, s. 26(1), 26(2)(c), 26(3).
Manitoba Public Insurance Corporation Act, R.S.M. 1987, c. P215, s. 33(1).
Public Utilities Board Act, R.S.M. 1987, c. P280, s. 44(1).

Counsel

P.R. Anderson and R.P. Oakes, for the appellant. W.S. Saranchuk, Q.C., for the Board. R.A.L. Nugent, Q.C., for the Manitoba Public Insurance Corporation. A.S. Peltz, for the intervenors.

The judgment of the Court was delivered by

TWADDLE J.A.

1 This appeal is from an order of The Public Utilities Board approving rates to be charged by the Manitoba Public Insurance Corporation for the insurance of motorcycles. There are two issues:

- (i) May the Board approve rates higher than those sought by the Corporation? and
- 1ii) Did the Board deny natural justice to the appellant by failing to give it a fair and full hearing?

2 In June, 1993, the Corporation applied to the Board for approval of 1994 rates for compulsory vehicle and driver insurance. The application sought approval of, amongst other things, a general increase of 15% in motorcycle rates.

3 In support of its application, the Corporation filed evidence which strongly suggested a need to increase motorcycle insurance rates by reason of past loss experience. Nonetheless, after the passage of legislation introducing a "no-fault" automobile insurance scheme in Manitoba, the Corporation filed an amended application, essentially asking for approval of rates reflecting no increase for major use categories, including motorcycles.

4 The Board held seven days of public hearings in October, 1993. Notwithstanding a need for some rate increases indicated by the Corporation's filed material, Corporation witnesses indicated a policy guideline not to

increase rates for the 1994/95 year. The Corporation's explanation for this policy was the acceptability and saleability of rate increases, given the public expectations of rate decreases arising from the implementation of the no-fault scheme.

5 Other evidence tendered to the Board, including that of the Corporation's consulting actuary, and that of the intervenors' expert, suggested that the Corporation's policy violated the principles of actuarially determined and statistically driven rates. In particular, the maintenance of motorcycle rates at the previous year's level violated those principles.

6 On November 23, 1993, the Board issued an order in which, with respect to motorcycle premiums, it approved an increase of 15%. The Corporation questioned the Board's authority to order adjustments which were not included in the Corporation's amended application. The Board replied, advising the Corporation of the statutory provisions which, in its view, gave it the necessary authority.

7 The Corporation was not convinced. It wrote to the Board requesting a review of the Board's decision and proposing the retention of standard rates for motorcycles for the 1994/95 policy year. The Board decided to hold a rehearing and arranged for notice to be given to all interested parties. The rehearing was scheduled for the week of January 10, 1994.

8 On receipt of notice, counsel for the appellant wrote to the Board expressing concern about the limited time available to prepare for the rehearing and asked for an order suspending the rate increase until a later hearing could be scheduled and the issues properly addressed. At the same time, counsel for the appellant filed a notice of application for leave to appeal to this Court from the November 23rd order.

9 No indication of postponement was given by the Board. The appellant's counsel prepared for the rehearing. He arranged with the Corporation for it to have certain witnesses available for cross-examination and for his client's own expert to have access to Corporation records.

10 At the commencement of the rehearing, the appellant's counsel expressed concern at the timing which, he said, created difficulties with respect to the presentation of new evidence and his preparation of the case as a whole. He did not, however, ask for an adjournment or an extended hearing.

11 During the course of the rehearing, the appellant's counsel, with his own expert at his side, cross-examined the Corporation's witnesses, including the consulting actuary, on the issues affecting the proposed 15% increase in motorcycle rates. He then elected not to call his own actuary. He was given the opportunity, which he took, of advancing final argument.

12 On January 31, 1994, the Board issued an order confirming the increase in motorcycle rates. In that Order, the Board considered, but rejected, each of the many arguments advanced by the appellant against a rate increase.

13 The appellant sought and obtained leave to appeal the November order, the January order and a further order made in between them. This further order approved the rate schedule tendered by the Corporation to incorporate the 15% increase required by the Board in its November order and was made subject to the outcome of the rehearing. Leave to appeal was granted on both the issue of the Board's authority and on the issue of adequate notice.

14 When the Manitoba Public Insurance Corporation was first established, The Public Utilities Board had no jurisdiction to deal with the rates charged by the Corporation for insurance. By s. 33(1) of The Manitoba Public Insurance Corporation Act, R.S.M. 1987, c. P215, the establishment of rates for automobile insurance was the sole responsibility of the Lieutenant Governor in Council.

15 This state of affairs was changed in the 1988-89 legislative session. The Crown Corporations Public Review and Accountability Act, S.M. 1988-89, c. 23 (sometimes hereinafter referred to as "The Accountability Act")

expressly conferred jurisdiction on the Board and limited the establishment of new rates by the Lieutenant Governor in Council to the establishment of rates which have been approved by the Board.

16 The Board's jurisdiction with respect to the Corporation's rates is set out in s. 26 of The Accountability Act in these terms:

26(1) Notwithstanding any other Act or law, rates for services provided by The Manitoba Telephone System, Manitoba Hydro and the Manitoba Public Insurance Corporation shall be reviewed by The Public Utilities Board under The Public Utilities Board Act and no change in rates for services shall be made and no new rates for services shall be introduced without the approval of The Public Utilities Board.

26(2) For the purposes of this Part, "rates for services" means

...

(c) in the case of the Manitoba Public Insurance Corporation, rate bases and premiums charged with respect to compulsory driver and vehicle insurance provided by that corporation.

26(3) The Public Utilities Board Act applies with any necessary changes to a review pursuant to this Part of rates for services.

17 The limitation on the power of the Lieutenant Governor in Council to establish new rates was imposed by s. 37(4) of The Accountability Act by way of amendment to s. 33 of The Manitoba Public Insurance Corporation Act. Subsection 33(1.1) of that latter Act now reads:

33(1.1) No regulation relating to premiums charged by the corporation for compulsory driver and vehicle insurance shall be passed pursuant to subsection (1) unless the Lieutenant Governor in Council is satisfied that the proposed change has been approved by The Public Utilities Board pursuant to Part IV of The Crown Corporations Public Review and Accountability Act.

18 The result is that neither the Board nor the Lieutenant Governor in Council can fix new rates for automobile insurance without the concurrence of the other. The Lieutenant Governor in Council can, of course, leave rates as they are if he does not agree with the rates approved by the Board, but that is his only alternative to establishing those rates which the Board has approved.

19 The role of the Lieutenant Governor in Council as the body responsible for fixing rates is not without significance to the first issue before us. It explains why, under s. 26(1) of The Accountability Act, the function of the Board is review and approval. The Board is not given actual power to determine what the new rates shall be as that power, limited as it is to fixing rates approved by the Board, is conferred on the Lieutenant Governor in Council.

20 Given that explanation for the power of "approval", I do not construe s. 26(1) as limiting the Board to the approval of rates proposed by the Corporation. This would inevitably lead to the "rubber stamping" of proposed rates or, if the proposed rates were rejected, to one or possibly several re-applications for rate approval. These subsequent applications would be extremely time-consuming and costly and could end up in a Mexican stand-off between the Corporation and the Board, the former refusing to accept rates indicated by the Board and the latter refusing to rubber-stamp a Corporation proposal. That is not, in my view, what the legislature intended.

21 Support for my view that the Board is free to approve a rate different from that proposed by the Corporation is to be found in s. 44(1) of The Public Utilities Board Act, R.S.M. 1987, c. P280, which is made applicable, as above noted, by s. 26(3) of The Accountability Act. Subsection 44(1) of The Public Utilities Board Act provides:

44(1) Upon any application to it, the board may make an order granting the whole or part only of the application or may grant such further or other relief in addition to or in substitution for that applied for, as fully and in all respects as if the application had been for such partial, further or other relief.

22 That subsection extends the Board's power of review and approval to the granting of other relief. The term "relief" is troublesome. That, however, is because lawyers identify the word with its usual legal meaning of aid sought by a party to a dispute. Clearly, approval of a higher rate than that sought by the Corporation is not aid sought by that party. But the word also means "alleviation of some burden" and "deliverance from some hardship, burden or grievance; remedy, redress" (The Oxford Universal Dictionary, 3rd ed., revised with addenda, 1964) and "anything that offers a pleasing change" (Webster's New World Dictionary, 3rd College ed. 1988). In my view, the legislature, in using the word "relief" intended to confer on the Board a power to approve a rate which would alleviate the burden on the Corporation of taking too little in premiums to justify taking the risks inherent in a particular class of insurance.

23 A power of "review" would make little sense if the Board could only approve or reject an application or fix a rate below that sought. The Board's function is not only to protect consumers from unreasonable changes, but also to ensure the fiscal health of the Corporation and fairness between different classes of consumer. Although the Corporation is not a public utility, as that term is defined in The Public Utilities Board Act, it is a Crown Corporation that is made accountable to the Board by The Accountability Act. It is the Corporation's accountability which gives the Board its broad power to approve a different rate than that sought by the Corporation.

24 The second point raised by the appellant is the lack of proper notice. They say, with respect to the original hearing, that they should have been given notice that the Board would consider a rate increase which had not been asked for. They add that the subsequent notice of the later hearing was "too little, too late."

25 The intervenors' counsel dealt rather well with the first of those points when he stated:

The issue of natural justice and the issue of Board jurisdiction are inextricably linked. If the Board has discretion to set any rate that is fair and reasonable upon the evidence and in the public interest, then all aspects of the rates are "in issue" when the Board holds a public hearing on rates. Notice of a rate hearing, in general terms, is notice that a rate applied for may vary in either direction.

26 Save that the Board approves rates, rather than sets them, I agree with that statement. As the Board had authority to set a different rate than that applied for, the rate hearing notice was sufficient notice of possible increases in rates.

27 I appreciate that until now the power of the Board to fix rates higher than those requested by the Corporation was uncertain. This Court now holds, however, that the power did exist and that it could be exercised on the hearing of the Corporation's application for approval of lower rates than those fixed by the Board. The fact that this was not understood by the appellant is, in my view, neither here nor there. I cannot accept that the Board was required to give notice that it might lawfully exercise its powers in a different way from that in which it was invited to exercise them by the Corporation.

28 The fact that the Board had not previously exercised the power adds nothing to the appellant's argument. The power, though dormant, was there to be exercised if the right circumstances arose. The Board is not required to give public notice of the powers it may exercise in response to an application. That is a point of law which people are deemed to know.

29 Also, as the intervenors' counsel again points out, "the possibility of a substantial increase in motorcycle rates was apparent in light of the Corporation's initial application (seeking a 15% increase) and, more importantly, in light of the overwhelming evidence in support of the application. Experienced intervenors, such as the Appellant Coalition of Manitoba Motorcycle Groups Inc., cannot claim to be unaware of the significance of loss ratio data in the Board's consideration of rates."

30 As to the allegedly inadequate notice of the January hearing, I think the appellant fails, if for no other reason, on the basis that its counsel requested neither an adjournment nor an extension of the hearing. The Board was in

a much better position than this Court to say whether the appellant had had sufficient time to prepare for the rehearing and, if it thought the appellant had not, to grant relief by way of an adjournment or an extended hearing. Not having sought that relief, the appellant's counsel can scarcely ask this Court to invalidate the Board's proceeding.

31 I add this: Given the need for a speedy Board decision, the fact that the issue was one of general public interest, and not of interest to the appellant alone, the limited scope of the rehearing, the fact that much of the evidence had been given at the earlier hearings and the extent of participation by the appellant's counsel, I do not think that the notice of the rehearing was inadequate.

32 For these reasons, I would dismiss the appeal. In view of the uncertainty as to the scope of the Board's power, an uncertainty which it took this case to resolve, and the public interest issues raised, I would make no order as to costs.

TWADDLE J.A.
HELPER J.A. -- I agree.
KROFT J.A. -- I agree.

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