COX TAYLOR
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Reply: **L. John Alexander***
alexander@coxtaylor.ca

File: L-770-13*LJA

November 17, 2017

BY ELECTRONIC FILING

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

Attention: Mr. Patrick Wruck, Commission Secretary and Manager, Regulatory Support

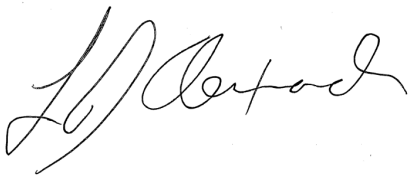
RE: Project No. 3698884
British Columbia Utilities Commission ("BCUC" or "Commission")
The City of Langford (the "City")
Sustainable Services Ltd. Geothermal System Status as a Public Utility under the *Utilities Commission Act*

The City of Langford writes in compliance with Commission Order No. G-138-17 to provide its reply final submission and related authorities in the above-mentioned proceeding.

This submission is in reply primarily to the Fortis BC Energy Inc. submission dated October 13, 2017 ("FEI").

Yours very truly,

COX TAYLOR



Per:
L. JOHN ALEXANDER*
*Law Corporation

Enclosure

Copy to: SSL-Sustainable Services Ltd.
957 Langford Parkway
Victoria, BC V9B 0A5

Fortis Energy Inc.
gas.regulatory.affairs@fortisbc.com

FortisBC Alternative Energy Services Inc.
faes.regulatory.affairs@fortisbc.com

A. The Principals of Statutory Interpretation Support a Harmonious Reading of the *UCA* and the *Community Charter*

The correct approach to statutory interpretation: the purposive approach

1. The City agrees with FEI that the issue raised in this proceeding is a narrow question of law and that the question before the Commission is whether the services as provided by the City through its partner SSL are such that this utility service falls within the definition of "public utility" as defined in the *Utilities Commission Act* (the "*UCA*").

2. In reply to FEI's argument, the City says the energy service that is provided only pursuant to its multi-Utility bylaw does not fall within the jurisdiction of the British Columbia Utilities Commission (the "BCUC"). The fact that the services are provided through a partner, SSL, does not negate the exclusion contained in sub-section (c) of the definition of "public utility" (the "Municipal Exclusion").

3. FEI's suggestion that:

> "…*It is not relevant whether the City of Langford is providing the utility service as a municipal service*."

Is incorrect.

4. Despite referencing the 'modern approach' to statutory interpretation, in arguing that SSL cannot benefit from the Municipal Exclusion, FEI is supporting an outdated, strict interpretation approach that is narrowly based and ignores the text and the context of the integrated statutory scheme.

5. FEI's approach to interpretation ignores the statutory scheme as a whole, the factual matrix before the Commission, and is fraught with the usual downfalls of such an interpretation: it adopts too narrow a meaning of the Municipal Exclusion, it ignores the commercial realties in which many municipalities seek to provide services, and it undermines not only the purpose of the Municipal Exclusion but also the partnering powers granted to municipalities under sections 8(2) and 21 the *Community Charter*.

6. The City says the correct approach is the approach that has been applied by the Supreme Court of Canada and adopted by our Court of Appeal, the purposive and contextual approach to statutory interpretation. Properly applied, this approach takes into account the objectives of the *UCA* and the *Community Charter*, the context in which municipalities are permitted to provide services, and

the legislative intention underlying the inclusion of the Municipal Exclusion within the *UCA*.

B. The Relevant Statutory Provisions

For ease of reference, the key provisions are reproduced below:

7. *UTILITIES COMMISSION ACT* [RSBC 1996] c. 473

"public utility" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

(a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or

[…]

but does not include

(c) a municipality … in respect of services provided by the municipality … within its own boundaries,

[…]

8. *COMMUNITY CHARTER [SBC 2003] c. 26*

Purposes of Act

3 The purposes of this Act are to provide municipalities and their councils with

(a) a legal framework for the powers, duties and functions that are necessary to fulfill their purposes,

(b) the authority and discretion to address existing and future community needs, and

(c) the flexibility to determine the public interest of their communities and to respond to the different needs and changing circumstances of their communities.

Broad interpretation

4 (1) The powers conferred on municipalities and their councils under this Act or the *Local Government Act* must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.
(2) If

(a) an enactment confers a specific power on a municipality or council in relation to a matter, and

(b) the specific power can be read as coming within a general power conferred under this Act or the Local Government Act,

the general power must not be interpreted as being limited by that specific power, but that aspect of the general power that encompasses the specific power may only be exercised subject to any conditions and restrictions established in relation to the specific power.

Fundamental Powers

8 (1) A municipality has the capacity, rights, powers and privileges of a natural person of full capacity.

(2) A municipality may provide any service that the council considers necessary or desirable, and may do this directly or through another public authority or another person or organization.

(3) A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:

(a) municipal services;
[…]

Partnering agreements

21 If a municipality enters into a partnering agreement for the provision of a service on behalf of the municipality, the council may

(a) provide assistance, other than tax exemptions, to a business in accordance with the agreement, and
(b) provide assistance by way of a tax exemption in accordance with Division 7 *[Permissive Exemptions]* of Part 7 *[Municipal Revenue]*.

9. *INTERPRETATION ACT* [RSBC 1996] c. 238

Enactment remedial

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

C. The Purposive Approach to Statutory Interpretation

Interpretation should minimize conflict

10. The presumption is that statutes that deal with the same subject matter are presumed to be harmonious, coherent and consistent:

> "In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, the Court further observed:
>
> > 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 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 SCC56 (CanLII), at para. 52 as "**the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter**".
>
> [**Emphasis Added**]

Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42 ["*Bell*"] at para. 27
R. v. Skakun, 2014 BCCA 223 ["*Skakun*"] at para. 14

11. Where possible, interpretations that harmonize different statutes and minimize conflict between statutes are preferred:

> "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* admiralty jurisdiction of the Federal Court under the *Federal Court Act*, in considering the "entire context" of s. 72(1) and the intent of Parliament, it is important to keep in mind the principles for harmonizing different statutes. Professor Ruth Sullivan expressed these principles as follows, in Driedger on the Construction of Statutes (3rd ed. 1994), at p. 288:

> The meaning of words in legislation depends not only on their immediate context but also on a larger context which includes the Act as a whole and the statute book as a whole. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. . . . **Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred**."

[Emphasis Added]

R. v. Ulybel Enterprises Ltd., [2001] 2 SCR 867, 2001 SCC 56 at para. 30

12. The presumptions of coherence and consistent expression dictate that the provisions of these statutes which deal with the same subject must be read as if they were "part of a single act":

> "The modern approach to statutory interpretation is 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" (Sullivan on the Construction of Statutes, 6th ed. (Toronto: Lexis Nexis, 2014 at p. 1). As well, Sullivan at p. 421, citing *Canada (Attorney General) v. Public Service Alliance of Canada*, 1991 CanLII 88 (SCC), [1991] 1 S.C.R. 614 at paras. 23 and 25, instructs that statutes which deal with the same subject:
>
> > … are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject … The provisions of each are read in the context of the others and consideration is given to whether they are part of a single scheme. The presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single act.
>
> The modern approach to statutory interpretation also requires that the words of a legislative provision be interpreted in a manner that takes into account their context. See *Peachland (District) v. Peachland Self Storage Ltd*., 2013 BCCA 273 (CanLII) at para. 19; and *R. v. Summers*, 2014 SCC 26 (CanLII) at para. 55."

Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd., [2016] B.C.J. No. 2269, 2016 BCCA 432 ["*CVRD*"] at para.'s 60 and 61

Statutes to be given fair, large and liberal construction

13. In addition to the authorities relating to statutory interpretation, the Commission must also apply s.8 of the *Interpretation Act* which calls for a "fair, large and liberal construction and interpretation" of the Municipal Exclusion:

> "This approach, the Court recognized, is not "founded on the wording of the Legislation alone" (para. 21) but requires consideration of "the plain meaning of the specific provisions in question" in the context of "the scheme of the [legislation], its object or the intention of the legislature" (para. 23). The Court also relied on the statutory principle codified in what is now s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238:
>
> > Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."
>
> *Skakun*, supra, at para. 13

D. The Principles of Statutory Application Properly Applied to the Factual Matrix in this Proceeding

The instructions underlying the purposive approach

14. The underlying fundamental principle of the purposive approach is that words of the statutory provision are to be read in their entire context. Entire context includes the Municipal Exclusion, the *UCA* and the body of law as a whole. The *UCA* must be read in the context of the relevant provisions of the *Community Charter*.

15. The second instruction in applying the purposive approach is that the words of the Municipal Exclusion must be read in their grammatical and ordinary sense *harmoniously* with the scheme and object of the *UCA* and the legislature's intention. It would be an error to stop the analysis upon determining a meaning after simply reading only the text contained in the Municipal Exclusion subsection. A complete analysis requires bringing the meaning into harmony with the scheme, object and intention of the legislature. The result is an approach to statutory interpretation that is decidedly centered on the underlying legislative intention.

16. The intent of legislature regarding utility regulation must not be limited to the language of a single clause or section. It must encompass the implied intention of the statutory scheme "the context", and the presumed intention of the legislature.

The implied intention speaks to the intention that may legitimately be implied by the enacted words of the Municipal Exclusion. The presumed intention speaks to the intention that, in the absence of any contrary indication, the Commission may impute to the legislature. It cannot be argued that the legislature does not intend that some local utility services can be regulated by local government. Nor can it be said the legislature intends double regulation.

Application of the instructions underlying the purposive approach

17. It is clear from the purposive approach that the words of the Municipal Exclusion - *that the definition of public utility "does not include services provided by a municipality… within its own boundaries"* – must be read in light of the object of this specific provision and the greater scheme of the *UCA* and in a way that harmonizes the *UCA* and the *Community Charter* so that any conflict or incoherence between the schemes of these statutes is minimized.

18. The Court of Appeal in *CVRD*, referenced above at paragraph 12, considered all of the relevant provisions of three inter-related statutes when considering a single narrow exclusion of the word "mine" from the definition of land. FEI wrongly ignores the need for such an analysis in this proceeding. The result in *CVRD* was a finding that the activity in question was excluded from the land use regulation power of one body. The result was also a finding that there was no resulting legislative conflict between the three inter-related statues. Unlike the facts in the *CVRD* case, the result of that assessment here is that there are 2 valid and effective ways in which monopolistic energy services are publicly regulated: 1) the Commission, or 2) a local government Council.

Legislative intent of the UCA and the public interest

19. The City agrees with FEI's position that the intent of the Legislature should be taken into account when interpreting the definition of "public utility". That intention shows two things: 1) Local government can be the regulator; and 2) Local government can provide services through partners.

20. To express the mandate of the BCUC, FEI quotes from a *Re Terasen Gas Inc*., Order G-23-10 (July 4, 2010) at para. 45:

> "*to protect the public interest by regulating public utilities, which tend to be natural monopolies, well positioned to otherwise take advantage of their customers*."

FEI's Final Argument Submissions at para. 14

21. For the Commission to interpret the Municipal Exclusion in the way the City asks does not thwart the underlying object of the *UCA* to protect the public interest, it simply asks the Commission to recognize that the object of the legislature in enacting the Municipal Exclusion was to permit local governments to utilize their powers to regulate monopoly services in the absence of Commission regulation. The City says, in reliance on the implied intent and presumed intent of the legislature, that in enacting the Municipal Exclusion the legislature recognized: 1) that a municipality may regulate municipal services, including services of a monopolistic nature 2) that municipal councillors can protect or uphold the public interest as they are held accountable to ratepayers and 3) that it is in the public interest to avoid double-regulation.

22. No evidence has been proffered in this proceeding that suggests the City's regulatory oversight of the services is inadequate or, in any way contrary to the public interest. The City is not espousing that the services be provided in the absence of regulation. Nor are SSL's activities unregulated.

23. The City opposes the suggestion by FEI that the approach advocated by the City:

> "…*would lead to the unacceptable result that any municipality or third party could avoid Commission regulation (and the public interest protection that underpins it)*."

FEI uses questions of ownership of the equipment and facilities to act as 'red herrings'. Such questions are not only irrelevant to the Municipal Exclusion when properly interpreted, they do not in any way minimize the municipality's ability to act in a regulatory capacity.

FEI's Final Argument Submissions at para. 22

24. The City makes two points in reply:

1) A municipality does avoid Commission regulation. Energy services provided directly by municipalities are clearly exempt. Otherwise, the municipal exemption is completely meaningless; and

2) To agree with the suggestion put forth by FEI effectively neuters the partnering powers permitted under the *Community Charter*.

Legislative intent of the Community Charter, broad interpretation

25. The express purpose of the *Community Charter* is to provide municipalities with the legal framework to fulfill their purposes which include, *inter alia*, the provision of services. Energy services are in no way excluded.

Community Charter, s.3

26. Further, the scheme of the *Community Charter* must be interpreted broadly in accordance with municipal purposes.

Community Charter, s. 4

27. The City is using the powers conferred on it under the *Community Charter* to provide a municipal district energy service. Properly interpreted, the powers conferred on the City under the *Community Charter* provide it with broad partnership powers including the power to contract with a private partner to build, own and operate a facility in perpetuity. No argument has been proffered in this proceeding that the City does not have the authority to partner with SSL or that the relationship between the City and SSL is anything other than a partnership as contemplated by the *Community Charter.*

Considerations of paramountcy are unnecessary with the purposive approach

28. In its submissions FEI relies on the *Surrey* case in stating that the City's regulation of the services is *ultra vires* the City's jurisdiction. The facts of the *Surrey* case are inconsistent with the facts before the Commission. The City of Langford is not attempting to regulate services *outside* of its municipal boundaries.

29. FEI says that the power and authority for the City to enter into partnering agreements:

> "*do not include any authority for a municipality to contract with a private third party for the provision of public utility service, outside the purview of Commission jurisdiction*".

The only possible way for FEI to arrive at this conclusion is to take its narrow, restrictive approach to the interpretation of the Municipal Exclusion.

30. Properly applied, the purposive approach requires the Commission to read the Municipal Exclusion in harmony with the partnering powers conferred on the municipality pursuant to the *Community Charter*.

31. A harmonious reading of the two acts is possible. It simply calls for the Commission to recognize that the Municipal Exclusion must be broadly interpreted to include services that are "provided by" a municipality through its partnering powers under the *Community Charter*.

32. Using the modern approach to statutory interpretation, neither sub-section 10(1) of the *Community Charter* nor sub-section 121(1)(a) of the *UCA* are engaged. There is no conflict or incoherency.

33. Resort to the doctrine of statutory paramountcy is only necessary where the legislation does create inconsistent or conflicting law. The broad, purposive approach to the interpretation of the Municipal Exclusion results in no inconsistency.

34. The doctrine of statutory paramountcy is unnecessary in this proceeding.

CONCLUSION

35. The Municipal Exclusion must be given some meaning. The City says the exclusion is a recognition that municipal services that are regulated at a local council level, even if they have a monopolistic character, need not be regulated by the Commission.

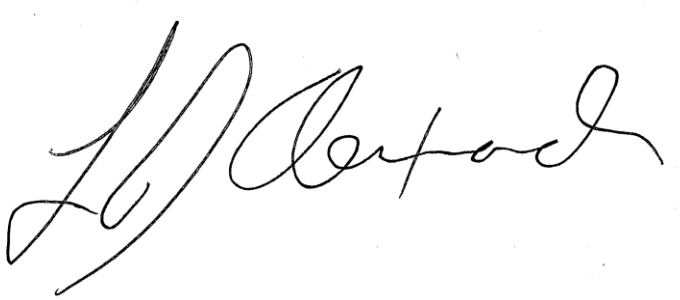
36. On the facts of this proceeding, the Multi-Utility bylaw is a perfectly valid bylaw that will continue to apply to the Westhills district energy system, as regulated by Langford Council.

37. Clearly double regulation must be avoided. The cost alone of double regulation (all of which is generally passed on to the consumer) cannot be in the public interest.

38. The City asks the Commission to apply the purposive approach to resolving the question it has posed and in doing so, read both the *UCA* and *Community Charter* harmoniously in a way that does not neuter the partnering powers conferred on a municipality under the *Community Charter*. The City submits that in doing so, the Commission will find that the Municipal Exclusion should be read broadly and find that the services that are the subject of this proceeding fall

within the definition of the Municipal Exclusion and are, accordingly, not subject to Commission regulation.

All of which is respectfully submitted.



November 17, 2017

_____
L. John Alexander
Counsel for the City of Langford

Book of Authorities

1. *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42

2. *R v. Skakun,* 2014 BCCA 223

3. *R v. Ulybel Enterprises Ltd.*, [2001] 2 SCR 867, 2001 SCC 56

4. *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.,* [2016] B.C.J. No. 2269, 2016 BCCA 432

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

Indexed as: Bell ExpressVu Limited Partnership *v.* Rex

Neutral citation: 2002 SCC 42.

File No.: 28227.

2001: December 4; 2002: April 26.

Bell ExpressVu Limited Partnership *Appelante*

c.

Richard Rex, Richard Rex, faisant affaire sous les dénominations sociales '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' et 'Digital Media Group', Anne Marie Halley, alias Anne Marie Rex, Michael Rex, alias Mike Rex, Rodney Kibler, alias Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, M. Untel 1 à 20, M^me^ Unetelle 1 à 20 et toute autre personne qui a été vue travaillant dans les locaux situés au 22409, avenue McIntosh, Maple Ridge, Colombie-Britannique, ou identifiée comme étant une telle personne, qui exploite des entreprises, ou l'une ou plusieurs de celles-ci, faisant affaire sous les dénominations sociales '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', ou qui travaille pour ces entreprises ou pour l'une ou plusieurs de celles-ci *Intimés*

et

Le procureur général du Canada, l'Association canadienne des distributeurs de films, DIRECTV, Inc., la Canadian Alliance for Freedom of Information and Ideas et le Congres Iberoamericain du Canada *Intervenants*

Répertorié : Bell ExpressVu Limited Partnership *c.* Rex

Référence neutre : 2002 CSC 42.

N^o^ du greffe : 28227.

2001 : 4 décembre; 2002 : 26 avril.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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 progamming. 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.

Présents : Les juges L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

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

Droit des communications — Radiocommunication — Distribution de programmation télévisuelle par satellite de radiodiffusion directe — Décodage au Canada de signaux encodés émanant de distributeurs étrangers utilisant des satellites — L'article 9(1)c) de la Loi sur la radiocommunication interdit-il le décodage de tous les signaux encodés émis par des satellites, sous réserve d'une exception limitée, ou prohibe-t-il seulement le décodage de signaux émanant de distributeurs canadiens titulaires de licence? — Loi sur la radiocommunication, L.R.C. 1985, ch. R-2, art. 9(1)c).

Lois — Interprétation — Principes — Approche contextuelle — Sens ordinaire et grammatical — Recours aux « valeurs de la Charte » comme principe d'interprétation seulement en cas d'ambiguïté véritable.

Appels — Questions constitutionnelles — Refus de répondre aux questions constitutionnelles pour cause d'absence de fondement factuel.

L'appelante, une entreprise de distribution de programmation télévisuelle par satellite de radiodiffusion directe (« SRD »), encode ses signaux pour en circonscrire la réception. Les intimés vendent à des clients canadiens des décodeurs américains leur permettant de recevoir et de regarder de la programmation SRD américaine. Ils fournissent en outre une adresse postale aux États-Unis à ceux de leurs clients qui n'en possèdent pas déjà une, car les radiodiffuseurs américains n'autorisent pas sciemment le décodage de leurs signaux par des personnes se trouvant à l'extérieur des États-Unis. L'appelante, à titre d'entreprise de distribution titulaire d'une licence, a intenté une action devant la Cour suprême de la Colombie-Britannique en vertu de l'al. 9(1)*c*) et du par. 18(1) de la *Loi sur la radiocommunication*, sollicitant notamment une injonction interdisant aux intimés d'aider des résidants canadiens à s'abonner à la programmation SRD américaine et à décoder les signaux pertinents. L'alinéa 9(1)*c*) interdit « de décoder, sans l'autorisation de leur distributeur légitime, [. . .] un signal d'abonnement ou une alimentation réseau ». Le juge siégeant en chambre a refusé l'injonction demandée. La Cour d'appel à la majorité a jugé que la personne qui décode des signaux non visés par la réglementation, tels ceux diffusés par les entreprises SRD américaines, ne contrevient pas à la disposition en question et elle a rejeté l'appel formé par l'appelante.

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

Arrêt : Le pourvoi est accueilli. L'alinéa 9(1)*c*) interdit le décodage de tous les signaux encodés transmis par satellite, sous réserve d'une exception limitée.

Le tribunal appelé à interpréter une disposition législative doit, dans chaque cas, se livrer à l'analyse contextuelle et téléologique privilégiée avant de décider si le texte de la disposition est ambigu. À cette fin, il lui faut lire les mots de la disposition dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de celle-ci et l'intention du législateur. C'est uniquement lorsque au moins deux interprétations plausibles, qui s'harmonisent chacune également avec l'intention du législateur, créent une ambiguïté véritable que les tribunaux doivent recourir à des moyens d'interprétation externes, y compris d'autres principes d'interprétation — telles l'interprétation stricte des lois pénales et la présomption de respect des « valeurs de la *Charte* ».

L'examen du contexte global de l'al. 9(1)*c*) et l'interprétation des mots qui le composent suivant leur sens ordinaire et grammatical, en conformité avec le cadre législatif dans lequel s'inscrit cette disposition, ne révèlent aucune ambiguïté et il n'est en conséquence pas nécessaire de recourir à l'un ou l'autre des principes subsidiaires d'interprétation législative. Puisque la *Loi sur la radiocommunication* n'interdit pas la radiodiffusion de signaux d'abonnement (exception faite de l'al. 9(1)*e*) qui interdit la retransmission non autorisée au Canada de tels signaux) et ne s'applique qu'au décodage survenant au Canada et aux autres endroits prévus au par. 3(3), la présente affaire ne soulève aucune question touchant à l'exercice extraterritorial de certains pouvoirs. Le législateur entendait interdire de manière absolue aux résidants du Canada de décoder des signaux d'abonnement encodés. La seule exception à cette interdiction est le cas où l'intéressé a obtenu l'autorisation de le faire du distributeur détenant au Canada les droits requis pour transmettre le signal concerné et en permettre le décodage. En l'espèce, les radiodiffuseurs SRD américains ne sont pas des « distributeurs légitimes » au sens de la Loi. Le fait de considérer que l'al. 9(1)*c*) établit une interdiction absolue assortie d'une exception limitée est une interprétation qui s'accorde bien avec les objets de la *Loi sur la radiodiffusion* et qui complète le régime établi par la *Loi sur le droit d'auteur*.

Aucune réponse n'a été donnée à l'égard des questions constitutionnelles, puisque le dossier ne comportait pas d'éléments relatifs à la *Charte* propres à permettre à la Cour de se prononcer sur ces questions. Une partie ne peut invoquer un argument entièrement nouveau qui aurait nécessité la production d'éléments de preuve additionnels au procès. Les « valeurs de la *Charte* » ne peuvent être

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.

utilisées pour éclairer l'interprétation de l'al. 9(1)*c*), puisqu'elles ne doivent être utilisées comme principe d'interprétation qu'en cas d'ambiguïté véritable. L'application d'une présomption générale de conformité à la *Charte* pourrait parfois contrecarrer le respect de l'intention véritable du législateur, contrairement à ce que prescrit la démarche privilégiée en matière d'interprétation législative, et perturber à tort l'équilibre dialogique entre les pouvoirs législatif, exécutif et judiciaire. Lorsqu'une loi n'est pas ambiguë, les tribunaux doivent donner effet à l'intention clairement exprimée par le législateur et éviter d'utiliser la *Charte* pour arriver à un résultat différent.

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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 Rupar*, 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.

The judgment of the Court was delivered by

IACOBUCCI J. —

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*

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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (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, qui a rejeté l'appel formé contre une décision de la Cour suprême de la Colombie-Britannique, [1999] B.C.J. No. 3092 (QL). Pourvoi accueilli.

K. William McKenzie, *Eugene Meehan*, *c.r.*, et *Jessica Duncan*, pour l'appelante.

Alan D. Gold et *Maureen McGuire*, pour tous les intimés, à l'exception de Michelle Lee.

Graham R. Garton, *c.r.*, et *Christopher Rupar*, pour l'intervenant le procureur général du Canada.

Roger T. Hughes, *c.r.*, pour l'intervenante l'Association canadienne des distributeurs de films.

Christopher D. Bredt, *Jeffrey D. Vallis* et *Davit D. Akman*, pour l'intervenante DIRECTV, Inc.

Ian W. M. Angus, pour l'intervenante la Canadian Alliance for Freedom of Information and Ideas.

Alan Riddell, pour l'intervenant le Congres Iberoamericain du Canada.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

Le présent pourvoi porte sur une question qui divise les tribunaux du pays, en l'occurrence l'interprétation qu'il convient de donner à l'al.

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.

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.

II. Background

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.

9(1)*c*) de la *Loi sur la radiocommunication*, L.R.C. 1985, ch. R-2 (mod. par L.C. 1991, ch. 11, art. 83). Plus concrètement, il s'agit de décider si l'al. 9(1)*c*) interdit le décodage de tous les signaux encodés transmis par satellite, sous réserve d'une exception limitée, ou s'il interdit seulement le décodage non autorisé des signaux émanant de distributeurs canadiens titulaires d'une licence.

2 Les intimés facilitent ce que l'on appelle généralement le « marché gris » de la radiodiffusion des signaux étrangers. Quoique cette expression suscite de nombreux débats — de fait une polémique — il n'est pas nécessaire d'y prendre part dans les présents motifs. En effet, la question fondamentale est plus restreinte et touche à l'interprétation de la disposition en cause : Eu égard aux faits de l'espèce, l'al. 9(1)*c*) a-t-il pour effet d'interdire le décodage des signaux encodés émanant de radiodiffuseurs américains? Pour les motifs qui suivent, j'arrive à la conclusion que cette disposition produit cet effet. En conséquence, j'accueillerais le pourvoi.

II. Contexte

3 L'appelante, une société en commandite, est une entreprise de distribution d'émissions de télévision par satellite de radiodiffusion directe (ci-après « entreprise de distribution SRD » ou « radiodiffuseur SRD »). Elle est l'un des deux fournisseurs qui exploitent actuellement la licence d'entreprise de distribution SRD que leur a accordée le Conseil de la radiodiffusion et des télécommunications canadiennes (le « CRTC ») en vertu de la *Loi sur la radiodiffusion*, L.C. 1991, ch. 11. Il existe deux distributeurs dans la même situation aux États-Unis, mais aucun n'est titulaire d'une licence du CRTC. Le marché de la radiodiffusion réglementée au Canada est effectivement fermé aux non-Canadiens depuis avril 1996, par suite de la décision du gouverneur en conseil ordonnant au CRTC de ne pas délivrer de licences de radiodiffusion ni d'accorder de modification ou de renouvellement de telles licences aux demandeurs qui sont des non-Canadiens (DORS/96-192). Cependant, les entreprises américaines sont titulaires de licences délivrées par la Federal Communications Commission des États-Unis qui les autorisent à diffuser leurs signaux dans ce pays. L'intervenante DIRECTV est la plus importante des deux sociétés américaines.

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.

Les fournisseurs de services de radiodiffusion directe transmettent leurs signaux aux téléspectateurs au moyen de satellites. Ils possèdent tous un ou plusieurs satellites en orbite géosynchrone, ou ont accès à de tels appareils. Seulement quelques degrés de longitude terrestre séparent habituellement les satellites, qui occupent les créneaux orbitaux attribués par convention internationale à chacun des différents pays signataires. À partir de stations terrestres de transmission sens terre-satellite, les fournisseurs de services de radiodiffusion directe transmettent leurs signaux aux satellites, qui les rediffusent sur une large portion de la surface terrestre, qu'on appelle l'« empreinte » du satellite. Les signaux relayés par satellite ont une portée qui ne respecte pas les frontières internationales et s'étend souvent à de nombreux pays. Toute personne qui se trouve à l'intérieur de l'empreinte et dispose du matériel requis (en général une petite antenne parabolique de réception, un amplificateur et un récepteur) peut capter les signaux.

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 authorized to decode its signals. The decoder is then activated and the customer receives unscrambled programming.

L'appelante utilise les satellites d'une entreprise canadienne, Telesat Canada. De plus, comme tous les autres radiodiffuseurs SRD au Canada et aux États-Unis, l'appelante encode ses signaux pour en circonscrire la réception. Pour décoder ou débrouiller les signaux de l'appelante et obtenir leur réception en clair, le client doit être muni d'un dispositif supplémentaire propre à l'appelante, les décodeurs des différents distributeurs n'étant pas compatibles entre eux. L'élément fonctionnel du décodeur est constitué d'une carte à puce à code unique que l'appelante active à distance. Grâce à ce dispositif, une fois que le client a choisi un bloc d'émissions et payé les frais d'abonnement, l'appelante peut transmettre au décodeur le message indiquant que le client est autorisé à décoder ses signaux. Le décodeur est ensuite activé et le client a accès à la programmation débrouillée.

6 The respondent, Richard Rex, carries on business as Can-Am Satellites. The other respondents are employees of, or independent contractors working for, Can-Am Satellites. The respondents are engaged in the business of selling U.S. DTH decoding

L'intimé Richard Rex exploite une entreprise connue sous le nom Can-Am Satellites. Les autres intimés sont soit des employés de Can-Am Satellites soit des entrepreneurs indépendants retenus par celle-ci. Les intimés vendent des

systems to Canadian customers who wish to subscribe to the services offered by the U.S. DTH broadcasters, which make use of satellites owned and operated by U.S. companies and parked in orbital slots assigned to the U.S. The footprints pertaining to the U.S. DTH broadcasters are large enough for their signals to be receivable in much of Canada, but because these broadcasters will not knowingly authorize their signals to be decoded by persons outside of the U.S., the respondents also provide U.S. mailing addresses for their customers who do not already have one. The respondents then contact the U.S. DTH broadcasters on behalf of their customers, providing the customer's name, U.S. mailing address, and credit card number. Apparently, this suffices to satisfy the U.S. DTH broadcasters that the subscriber is resident in the U.S., and they then activate the customer's smart card.

In the past, the respondents were providing similar services for U.S. residents, so that they could obtain authorization to decode the Canadian appellant's programming signals. The respondents were authorized sales agents for the appellant at the time, but because this constituted a breach of the terms of the agency agreement, the appellant unilaterally terminated the relationship.

The present appeal arises from an action brought by the appellant in the Supreme Court of British Columbia. The appellant, as a licensed distribution undertaking, commenced the action pursuant to ss. 9(1)(*c*) and 18(1) of the *Radiocommunication Act*. As part of the relief it sought, the appellant requested an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. The chambers judge hearing the matter declined to grant the injunctive relief, and directed that the trial of the matter proceed on an expedited basis. On appeal of the chambers judge's ruling, Huddart J.A. dissenting, the Court of Appeal for British Columbia dismissed the appellant's appeal.

décodeurs américains de signaux SRD aux clients canadiens qui désirent s'abonner aux services offerts par les radiodiffuseurs SRD américains, lesquels utilisent des satellites qui appartiennent à des sociétés américaines et qui sont exploités par celles-ci et occupent des créneaux orbitaux ayant été attribués aux États-Unis. Les empreintes des radiodiffuseurs SRD américains sont suffisamment larges pour que leurs signaux puissent être captés presque partout au Canada. Mais comme ces radiodiffuseurs n'autorisent pas sciemment le décodage de leurs signaux par des personnes se trouvant à l'extérieur des États-Unis, les intimés fournissent en outre une adresse postale aux États-Unis à ceux de leurs clients qui n'en possèdent pas déjà une. Les intimés communiquent ensuite avec les radiodiffuseurs SRD américains pour le compte de leurs clients, fournissant les noms, adresse postale aux États-Unis et numéro de carte de crédit de chacun de ceux-ci. Il semble que cela soit suffisant pour convaincre les radiodiffuseurs américains que l'abonné est un résidant des États-Unis. La carte à puce du client est ensuite activée.

7 Dans le passé, les intimés offraient des services analogues à des résidants des États-Unis, de façon à pouvoir obtenir l'autorisation de décoder les signaux de l'appelante. Les intimés étaient des vendeurs autorisés de l'appelante à l'époque, mais comme cette pratique constituait un manquement à la convention de mandat, l'appelante a mis fin unilatéralement à leurs relations.

8 Le présent pourvoi fait suite à une action intentée par l'appelante devant la Cour suprême de la Colombie-Britannique. L'appelante, à titre d'entreprise de distribution titulaire d'une licence, a pris action en vertu de l'al. 9(1)*c*) et du par. 18(1) de la *Loi sur la radiocommunication*. Elle a notamment demandé une injonction interdisant aux intimés d'aider des résidants canadiens à s'abonner aux émissions transmises par des services SRD américains et à décoder les signaux pertinents. Le juge siégeant en chambre qui a été saisi de la demande a refusé l'injonction demandée et a ordonné que l'affaire soit entendue promptement. En appel de cette décision, la Cour d'appel de la Colombie-Britannique a débouté l'appelante, madame le juge Huddart rédigeant des motifs de dissidence.

9 The appellant applied for leave to appeal to this Court, which was granted on April 19, 2001, with costs to the applicant in any event of the cause ([2001] 1 S.C.R. vi). The Chief Justice granted the respondents' subsequent motion to state constitutional questions on September 4, 2001.

III. Relevant Statutory Provisions

10 The *Radiocommunication Act* is one of the legislative pillars of Canada's broadcasting framework. It and another of the pillars, the *Broadcasting Act*, provide context that is of central importance to this appeal. I set out the most pertinent provisions below. I will cite other provisions throughout the course of my reasons as they become relevant.

11 *Radiocommunication Act*, R.S.C. 1985, c. R-2

2. In this Act,

"broadcasting" means any radiocommunication in which the transmissions are intended for direct reception by the general public;

. . .

"encrypted" means treated electronically or otherwise for the purpose of preventing intelligible reception;

"lawful distributor", in relation to an encrypted subscription programming signal or encrypted network feed, means a person who has the lawful right in Canada to transmit it and authorize its decoding;

. . .

"radiocommunication" or "radio" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3 000 GHz propagated in space without artificial guide;

. . .

"subscription programming signal" means radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge;

L'appelante a sollicité l'autorisation de se pourvoir devant notre Cour, qui a fait droit à sa demande le 19 avril 2001, avec dépens en faveur de la demanderesse quelle que soit l'issue de l'appel ([2001] 1 R.C.S. vi). Le 4 septembre 2001, le Juge en chef a accueilli la requête présentée subséquemment par les intimés afin d'obtenir la formulation de questions constitutionnelles.

III. Dispositions législatives applicables

La *Loi sur la radiocommunication* est l'un des piliers législatifs du système canadien de radiodiffusion. Cette loi, ainsi qu'une autre tout aussi importante, la *Loi sur la radiodiffusion*, établissent le contexte crucial pour juger le présent pourvoi. Les dispositions les plus pertinentes sont reproduites ci-après, mais j'en citerai d'autres au besoin dans l'exposé de mes motifs.

Loi sur la radiocommunication, L.R.C. 1985, ch. R-2

2. Les définitions qui suivent s'appliquent à la présente loi.

. . .

« distributeur légitime » La personne légitimement autorisée, au Canada, à transmettre un signal d'abonnement ou une alimentation réseau, en situation d'encodage, et à en permettre le décodage.

« encodage » Traitement électronique ou autre visant à empêcher la réception en clair.

. . .

« radiocommunication » ou « radio » Toute transmission, émission ou réception de signes, de signaux, d'écrits, d'images, de sons ou de renseignements de toute nature, au moyen d'ondes électromagnétiques de fréquences inférieures à 3 000 GHz transmises dans l'espace sans guide artificiel.

« radiodiffusion » Toute radiocommunication dont les émissions sont destinées à être reçues directement par le public en général.

. . .

« signal d'abonnement » Radiocommunication destinée à être reçue, directement ou non, par le public au Canada ou ailleurs moyennant paiement d'un prix d'abonnement ou de toute autre forme de redevance.

9. (1) 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;

. . .

10. (1) Every person who

. . .

(*b*) without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that 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,

. . .

is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

. . .

(2.1) Every person who contravenes paragraph 9(1)(*c*) or (*d*) is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

. . .

(2.5) No person shall be convicted of an offence under paragraph 9(1)(*c*), (*d*) or (*e*) if the person exercised all due diligence to prevent the commission of the offence.

. . .

9. (1) 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;

. . .

10. (1) Commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, dans le cas d'une personne physique, une amende maximale de cinq mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines, ou, dans le cas d'une personne morale, une amende maximale de vingt-cinq mille dollars quiconque, selon le cas :

. . .

b) sans excuse légitime, fabrique, importe, distribue, loue, met en vente, vend, installe, modifie, exploite ou possède tout matériel ou dispositif, ou composante de celui-ci, dans des circonstances donnant à penser que l'un ou l'autre est utilisé en vue d'enfreindre l'article 9, l'a été ou est destiné à l'être;

. . .

(2.1) Quiconque contrevient aux alinéas 9(1)*c*) ou *d*) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, dans le cas d'une personne physique, une amende maximale de dix mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines, dans le cas d'une personne morale, une amende maximale de vingt-cinq mille dollars.

. . .

(2.5) Nul ne peut être déclaré coupable de l'infraction visée aux alinéas 9(1)*c*), *d*) ou *e*) s'il a pris les mesures nécessaires pour l'empêcher.

. . .

18. (1) Any person who

(*a*) holds an interest in the content of a subscription programming signal or network feed, by virtue of copyright ownership or a licence granted by a copyright owner,

. . .

(*c*) holds a licence to carry on a broadcasting undertaking issued by the Canadian Radio-television and Telecommunications Commission under the *Broadcasting Act*, or

. . .

may, where the person has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(*c*), (*d*) or (*e*) or 10(1)(*b*), in any court of competent jurisdiction, sue for and recover damages from the person who engaged in the conduct, or obtain such other remedy, by way of injunction, accounting or otherwise, as the court considers appropriate.

. . .

(6) Nothing in this section affects any right or remedy that an aggrieved person may have under the *Copyright Act*.

Broadcasting Act, S.C. 1991, c. 11

2. (1) In this Act,

"broadcasting" means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

. . .

"broadcasting undertaking" includes a distribution undertaking, a programming undertaking and a network;

. . .

"distribution undertaking" means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or

18. (1) Peut former, devant tout tribunal compétent, un recours civil à l'encontre du contrevenant quiconque a subi une perte ou des dommages par suite d'une contravention aux alinéas 9(1)*c*), *d*) ou *e*) ou 10(1)*b*) et :

a) soit détient, à titre de titulaire du droit d'auteur ou d'une licence accordée par ce dernier, un droit dans le contenu d'un signal d'abonnement ou d'une alimentation réseau;

. . .

c) soit est titulaire d'une licence attribuée, au titre de la *Loi sur la radiodiffusion*, par le Conseil de la radiodiffusion et des télécommunications canadiennes et l'autorisant à exploiter une entreprise de radiodiffusion;

. . .

Cette personne est admise à exercer tous recours, notamment par voie de dommages-intérêts, d'injonction ou de reddition de compte, selon ce que le tribunal estime indiqué.

. . .

(6) Le présent article ne porte pas atteinte aux droits et aux recours prévus par la *Loi sur le droit d'auteur*.

Loi sur la radiodiffusion, L.C. 1991, ch. 11

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

« entreprise de distribution » Entreprise de réception de radiodiffusion pour retransmission, à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, en vue de sa réception dans plusieurs résidences permanentes ou temporaires ou locaux d'habitation, ou en vue de sa réception par une autre entreprise semblable.

. . .

« entreprise de radiodiffusion » S'entend notamment d'une entreprise de distribution ou de programmation, ou d'un réseau.

. . .

temporary residence or dwelling unit or to another such undertaking;

« radiodiffusion » Transmission, à l'aide d'ondes radioélectriques ou de tout autre moyen de télécommunication, d'émissions encodées ou non et destinées à être reçues par le public à l'aide d'un récepteur, à l'exception de celle qui est destinée à la présentation dans un lieu public seulement.

. . .

. . .

(2) For the purposes of this Act, "other means of telecommunication" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.

(2) Pour l'application de la présente loi, sont inclus dans les moyens de télécommunication les systèmes électromagnétiques — notamment les fils, les câbles et les systèmes radio ou optiques —, ainsi que les autres procédés techniques semblables.

(3) This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

(3) L'interprétation et l'application de la présente loi doivent se faire de manière compatible avec la liberté d'expression et l'indépendance, en matière de journalisme, de création et de programmation, dont jouissent les entreprises de radiodiffusion.

3. (1) It is hereby declared as the broadcasting policy for Canada that

3. (1) Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion :

(*a*) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

a) le système canadien de radiodiffusion doit être, effectivement, la propriété des Canadiens et sous leur contrôle;

(*b*) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

b) le système canadien de radiodiffusion, composé d'éléments publics, privés et communautaires, utilise des fréquences qui sont du domaine public et offre, par sa programmation essentiellement en français et en anglais, un service public essentiel pour le maintien et la valorisation de l'identité nationale et de la souveraineté culturelle;

. . .

. . .

(*d*) the Canadian broadcasting system should

d) le système canadien de radiodiffusion devrait :

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(i) servir à sauvegarder, enrichir et renforcer la structure culturelle, politique, sociale et économique du Canada,

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

(ii) favoriser l'épanouissement de l'expression canadienne en proposant une très large programmation qui traduise des attitudes, des opinions, des idées, des valeurs et une créativité artistique canadiennes, qui mette en valeur des divertissements faisant appel à des artistes canadiens et qui fournisse de l'information et de l'analyse concernant le Canada et l'étranger considérés d'un point de vue canadien,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances

(iii) par sa programmation et par les chances que son fonctionnement offre en matière d'emploi, répondre aux besoins et aux intérêts, et refléter la condition

and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

(iv) be readily adaptable to scientific and technological change;

. . .

(*t*) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

(iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

et les aspirations, des hommes, des femmes et des enfants canadiens, notamment l'égalité sur le plan des droits, la dualité linguistique et le caractère multiculturel et multiracial de la société canadienne ainsi que la place particulière qu'y occupent les peuples autochtones,

(iv) demeurer aisément adaptable aux progrès scientifiques et techniques;

. . .

t) les entreprises de distribution :

(i) devraient donner priorité à la fourniture des services de programmation canadienne, et ce en particulier par les stations locales canadiennes,

(ii) devraient assurer efficacement, à l'aide des techniques les plus efficientes, la fourniture de la programmation à des tarifs abordables,

(iii) devraient offrir des conditions acceptables relativement à la fourniture, la combinaison et la vente des services de programmation qui leur sont fournis, aux termes d'un contrat, par les entreprises de radiodiffusion,

(iv) peuvent, si le Conseil le juge opportun, créer une programmation — locale ou autre — de nature à favoriser la réalisation des objectifs de la politique canadienne de radiodiffusion, et en particulier à permettre aux minorités linguistiques et culturelles mal desservies d'avoir accès aux services de radiodiffusion.

(2) Il est déclaré en outre que le système canadien de radiodiffusion constitue un système unique et que la meilleure façon d'atteindre les objectifs de la politique canadienne de radiodiffusion consiste à confier la réglementation et la surveillance du système canadien de radiodiffusion à un seul organisme public autonome.

Copyright Act, R.S.C. 1985, c. C-42

21. (1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

(*a*) to fix it,

(*b*) to reproduce any fixation of it that was made without the broadcaster's consent,

Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42

21. (1) Sous réserve du paragraphe (2), le radiodiffuseur a un droit d'auteur qui comporte le droit exclusif, à l'égard du signal de communication qu'il émet ou de toute partie importante de celui-ci :

a) de le fixer;

b) d'en reproduire toute fixation faite sans son autorisation;

(*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*).

31. . . .

(2) It is not an infringement of copyright to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(*a*) the communication is a retransmission of a local or distant signal;

(*b*) the retransmission is lawful under the *Broadcasting Act*;

(*c*) the signal is retransmitted simultaneously and in its entirety, except as otherwise required or permitted by or under the laws of Canada; and

(*d*) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act.

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*).

31. . . .

(2) Ne constitue pas une violation du droit d'auteur la communication au public, par télécommunication, d'une œuvre, lorsqu'elle consiste en la retransmission d'un signal local ou éloigné, selon le cas, celle-ci étant licite en vertu de la *Loi sur la radiodiffusion*, que le signal est retransmis, sauf obligation ou permission légale ou réglementaire, intégralement et simultanément et que, dans le cas de la retransmission d'un signal éloigné, le retransmetteur a acquitté les redevances et respecté les modalités fixées sous le régime de la présente loi.

IV. Judgments Below

A. *Supreme Court of British Columbia*, [1999] B.C.J. No. 3092 (QL)

In a judgment delivered orally in chambers, Brenner J. (now C.J.B.C.S.C.) noted that there is conflicting jurisprudence on the interpretation of s. 9(1)(*c*). It was the chambers judge's opinion, however, that the provision is unambiguous, and that it poses no contradiction to the remainder of the *Radiocommunication Act*. He interpreted s. 9(1)(*c*) as applying only to the theft of signals from "lawful distributors" in Canada, and not applying to the "paid subscription by Canadians to signals from distributors outside Canada" (para. 20). He reasoned (at paras. 18-19):

The offence in that section that was created by the language Parliament chose to use was the offence of stealing encrypted signals from distributors in Canada. In my view, if Parliament had intended in that section to make it an offence in Canada to decode foreign encrypted

IV. Les décisions des juridictions inférieures

A. *Cour suprême de la Colombie-Britannique*, [1999] B.C.J. No. 3092 (QL)

12 Dans un jugement prononcé de vive voix dans son cabinet, le juge Brenner (maintenant juge en chef de la C.S.C.-B.) a souligné l'existence de décisions ayant interprété de façon contradictoire l'al. 9(1)*c*). À son avis, cependant, cette disposition n'est ni ambiguë ni incompatible avec les autres dispositions de la *Loi sur la radiocommunication*. Selon lui, l'al. 9(1)*c*) ne s'applique qu'au vol de signaux commis contre un « distributeur légitime » au Canada, et non aux [TRADUCTION] « abonnements pris et payés par des Canadiens afin de recevoir des signaux transmis par des distributeurs de l'extérieur du Canada » (par. 20). Le juge Brenner a fait le raisonnement suivant (aux par. 18-19) :

[TRADUCTION] Dans cette disposition, l'infraction créée par le législateur au moyen de libellé qu'il a choisi d'utiliser est le vol de signaux encodés aux distributeurs situés au Canada. À mon sens, si, comme le prétend [l'appelante], le législateur avait voulu que l'infraction soit le

transmissions originating outside Canada as contended by the [appellant], it would have said so. In s. 9(1)(c) Parliament could have used language prohibiting the unauthorized decoding of all or any subscription programming in Canada. This, it chose not to do.

The interpretation of s. 9(1)(c) asserted by the [appellant] makes no distinction between those who subscribe and pay for services from non-resident distributors and those who steal the signals of lawful distributors in Canada. That interpretation would create a theft offence applicable to persons in Canada who are nonetheless paying for the services they receive. If Parliament had intended s. 9(1)(c) to apply to such conduct, it would have said so in clear language. In my view the quasi criminal provisions in the Radiocommunication Act should not be interpreted in this manner in the absence of such clear parliamentary language.

13 Brenner J. therefore refused to grant the injunctive relief sought by the appellant. He directed that the trial of the matter proceed on an expedited basis.

B. *Court of Appeal for British Columbia* (2000), 79 B.C.L.R. (3d) 250, 2000 BCCA 493

14 The majority of the Court of Appeal, in a judgment written by Finch J.A. (now C.J.B.C.), identified two divergent strands of case law regarding the proper interpretation of s. 9(1)(*c*). The majority also noted that judgments representing each side had found the provision to be unambiguous; in its assessment, though, "[l]egislation which can reasonably be said to bear two unambiguous but contradictory, interpretations must, at the very least, be said to be ambiguous" (para. 35). For this reason, and the fact that s. 9(1)(*c*) bears penal consequences, the majority held that the "narrower interpretation adopted by the chambers judge . . . must . . . prevail" (para. 35). Conflicting authorities aside, however, the majority was prepared to reach the same result through application of the principles of statutory construction.

décodage, au Canada, d'un signal émanant de l'extérieur du Canada, il l'aurait dit. Le législateur aurait pu, à l'al. 9(1)c), interdire expressément le décodage non autorisé de tout signal d'abonnement. Or il a décidé de ne pas le faire.

L'interprétation de l'al. 9(1)c) préconisée par [l'appelante] ne fait aucune distinction entre la personne qui s'abonne, moyennant paiement, aux services d'un distributeur non résidant et la personne qui vole les signaux d'un distributeur légitime au Canada. Suivant une telle interprétation, une personne résidant au Canada pourrait commettre un vol, même si elle paie les services qu'elle reçoit. Si le législateur avait voulu que l'al. 9(1)c) s'applique à cette situation, il l'aurait dit clairement. Selon moi, les dispositions quasi pénales de la Loi sur la radiocommunication ne doivent pas être interprétées ainsi en l'absence d'une disposition législative claire à cet effet.

Le juge Brenner a en conséquence refusé à l'appelante l'injonction qu'elle demandait et il a ordonné que l'affaire soit entendue promptement.

B. *Cour d'appel de la Colombie-Britannique* (2000), 79 B.C.L.R. (3d) 250, 2000 BCCA 493

S'exprimant pour les juges majoritaires de la Cour d'appel, le juge Finch (maintenant juge en chef de la Colombie-Britannique) a relevé deux courants jurisprudentiels divergents concernant l'interprétation qu'il convient de donner à l'al. 9(1)*c*). Les juges majoritaires ont également souligné que, dans des jugements de chacun de ces courants, on a jugé que la disposition n'était pas ambiguë, mais, de l'avis des juges de la majorité, [TRADUCTION] « [u]ne disposition dont on peut raisonnablement dire qu'elle se prête à deux interprétations non ambiguës mais contradictoires doit à tout le moins être considérée comme ambiguë » (par. 35). Pour cette raison et parce que l'al. 9(1)*c*) entraîne des conséquences du point de vue pénal, les juges majoritaires ont conclu que [TRADUCTION] « l'interprétation restrictive du juge siégeant en chambre [. . .] doit [. . .] être retenue » (par. 35). Toutefois, indépendamment de la jurisprudence contradictoire, la majorité était disposée à aboutir au même résultat par l'application des principes d'interprétation législative.

Section 9(1)(*c*) enjoins the decoding of encrypted signals without the authorization of the "lawful distributor of the signal or feed" (emphasis added). The majority interpreted the legislator's choice of the definite article "the", underlined in the above phrase, to mean that the prohibition applies only "to signals broadcast by lawful distributors who are licensed to authorize decoding of that signal" (para. 36). In other words, "[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" (para. 36). Consequently, according to the majority, 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.

The majority characterized s. 9(1)(*c*) as being clearly directed at regulation of the recipient rather than the distributor, but stated that Parliament had not chosen language that would prohibit the decoding of encrypted signals regardless of origin. Rather, in the majority's view, Parliament elected to regulate merely in respect of signals transmitted by parties who are authorized by Canadian law to do so. Dismissing the appellant's argument regarding the words "or elsewhere" in the definition of "subscription programming signal", the majority held that "the fact that a subscription program signal originating outside Canada was intended for reception outside Canada, does not avoid the requirement in s. 9(1)(c) that the decoding of such signals is only unlawful if it is done without the authorization of a lawful distributor" (para. 40).

Basing its reasons on these considerations, the majority held that it was unnecessary to address "the wider policy issues" or the issues arising from the *Canadian Charter of Rights and Freedoms* (para. 44). Finding no error in the chambers judge's interpretation, the majority dismissed the appeal.

15 Aux termes du texte anglais de l'al. 9(1)*c*), il est interdit de décoder un signal d'abonnement ou une alimentation réseau sans l'autorisation du « *lawful distributor of the signal or feed* » (je souligne). La majorité a considéré que le fait que le législateur ait choisi d'utiliser l'article défini « *the* » — qui est souligné dans l'extrait qui précède — signifie que l'interdiction ne s'applique qu'aux [TRADUCTION] « signaux radiodiffusés par les distributeurs légitimes titulaires d'une licence les autorisant à permettre le décodage du signal en question » (par. 36). En d'autres termes, [TRADUCTION] « [s]i un signal d'abonnement n'a pas de distributeur légitime au Canada, personne ne saurait être autorisé à en permettre le décodage » (par. 36). Par conséquent, la majorité a conclu que la personne qui décode des signaux non visés par la réglementation, tels ceux diffusés par les entreprises SRD américaines, ne contrevient pas à l'al. 9(1)*c*).

16 La majorité a jugé que l'al. 9(1)*c*) visait clairement la personne qui reçoit le signal et non celle qui le distribue, mais elle a ajouté que le législateur ne s'était pas exprimé d'une manière qui aurait pour effet d'interdire le décodage de tout signal encodé, indépendamment de son origine. Au contraire, de l'avis de la majorité, le législateur a plutôt décidé de réglementer uniquement les signaux transmis par des personnes légalement autorisées par le droit canadien à le faire. Rejetant la thèse de l'appelante concernant les mots « *or elsewhere* » (« ou ailleurs » en français) employés dans la définition de « signal d'abonnement », la majorité a conclu que [TRADUCTION] « le fait qu'un signal d'abonnement émanant de l'extérieur du Canada soit destiné à être capté à l'extérieur du Canada n'empêche pas que, suivant l'al. 9(1)*c*), le décodage d'un tel signal n'est illégal que s'il a lieu sans la permission d'un distributeur légitime » (par. 40).

17 S'appuyant sur ces considérations, la majorité a estimé qu'il était inutile d'examiner [TRADUCTION] « les questions de principe plus générales » ou les questions touchant à l'application de la *Charte canadienne des droits et libertés* (par. 44). Ne relevant aucune erreur dans l'interprétation du juge siégeant en chambre, la majorité a rejeté l'appel.

18 Dissenting, Huddart J.A. considered the text of s. 9(1)(*c*) in light of the definitions set out in s. 2, and concluded that Parliamentary intent was evident: the provision "simply render[s] unlawful the decoding in Canada of all encrypted programming signals . . . regardless of their source or intended destination", except where authorization is given by a person having the lawful right in Canada to transmit and authorize the decoding of the signals (para. 48). She stressed that the line of cases relied upon by the chambers judge "[a]t most . . . provides support for a less inclusive interpretation of s. 9(1)(c) than its wording suggests on its face because it has penal consequences" (para. 54), and proceeded to set out a number of reasons for which these cases should not be followed.

Dissidente, madame le juge Huddart a examiné le texte de l'al. 9(1)*c*) à la lumière des définitions figurant à l'art. 2 et elle a estimé que l'intention du législateur était évidente : la disposition [TRADUCTION] « a tout simplement pour effet de frapper d'illégalité le décodage au Canada de tous les signaux d'abonnement encodés [. . .] indépendamment de leur source ou de leur destination », sauf dans les cas où la personne légitimement autorisée au Canada à transmettre le signal concerné et à en permettre le décodage accorde la permission de le faire (par. 48). Elle a souligné que les décisions invoquées par le juge siégeant en chambre [TRADUCTION] « [t]out au plus [. . .] appuient une interprétation de l'al. 9(1)*c*) lui reconnaissant une portée moins exhaustive que celle suggérée par son libellé, en raison des conséquences qu'il emporte du point de vue pénal » (par. 54), puis elle énonce un certain nombre de raisons pour lesquelles ces décisions ne devraient pas être suivies.

19 For one, "the task of interpreting a statutory provision does not begin with its being typed as penal. The task of interpretation is a search for the intention of Parliament" (para. 55). As well, the more restrictive reading of s. 9(1)(*c*) "ignores the broader policy objective" of the governing regulatory scheme, this being "the maintenance of a distinctively Canadian broadcasting industry in a large country with a small population within the transmission footprint of arguably the most culturally assertive country in the world with a population ten times larger" (para. 49). Huddart J.A. also referred to the existence of copyright interests, and stated that "[i]t can reasonably be inferred that U.S. distributors have commercial or legal reasons apart from Canadian laws for not seeking a Canadian market. . . . Yet only Canada can control the reception of foreign signals in Canada" (para. 50).

Tout d'abord, [TRADUCTION] « on n'amorce pas l'interprétation d'une disposition législative en la qualifiant de pénale. L'interprétation consiste à dégager l'intention du législateur » (par. 55). De plus, l'interprétation restrictive de l'al. 9(1)*c*) [TRADUCTION] « ne tient pas compte de l'objectif directeur plus général » du cadre réglementaire applicable, savoir « l'existence d'un système de radiodiffusion véritablement canadien dans un pays au vaste territoire mais faiblement peuplé, et ce à l'intérieur de l'empreinte de transmission d'un pays à la population dix fois plus grande et qui, peut-on prétendre, est celui qui répand le plus sa culture aux quatre coins du monde » (par. 49). Le juge Huddart a également fait état de la question des droits d'auteur et affirmé qu'[TRADUCTION] « [i]l est raisonnablement possible d'inférer que, indépendamment des lois canadiennes, les distributeurs américains ont des motifs commerciaux ou juridiques de ne pas s'attaquer au marché canadien. [. . .] Néanmoins, seul le Canada peut régir la réception de signaux étrangers au Canada » (par. 50).

20 Huddart J.A. declined the respondents' invitation to read s. 9(1)(*c*) in a manner that "respect[s] section 2(*b*) of the *Charter*" (para. 57), relying on *Canada*

S'appuyant sur l'arrêt *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554, madame le juge Huddart a refusé de donner à l'al. 9(1)*c*) une

(Attorney General) v. Mossop, [1993] 1 S.C.R. 554, in this regard. She then concluded (at para. 58):

> In summary, I am not persuaded the line of cases on which the chambers judge relied establish the provision is ambiguous or capable of contradictory meanings. I do not consider courts have found two entirely different unambiguous meanings for the provision. The words of section 9(1)(c), taken alone, provide a clear basis for the determination of Parliament's intention. That meaning is consistent with the purpose of the entire regulatory scheme in the context of the international copyright agreements, with the purpose of the *Act* within that scheme, and with the scheme of the *Act* itself. Those cases interpreting the provision differently have done so with the purpose of narrowing its application to avoid penal consequences of what Parliament clearly intended to have penal consequences, as at least one of the judges taking that view explicitly acknowledged in his reasons. In my view it takes a convoluted reading of the provision to produce the result reached by the court in *R. v. Love* [(1997), 117 Man. R. (2d) 123 (Q.B.)], and the decisions that have followed it.

Huddart J.A. would have allowed the appeal and granted the declaration requested by the appellant.

V. Issues

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*?

interprétation [TRADUCTION] « respect[ant] l'al. 2*b*) de la *Charte* » (par. 57), comme l'invitaient à le faire les intimés. Elle a ensuite conclu ainsi (au par. 58) :

> [TRADUCTION] En résumé, je ne suis pas persuadée que la jurisprudence sur laquelle s'est fondé le juge siégeant en chambre établit que la disposition est ambiguë ou susceptible d'interprétations contradictoires. Je n'estime pas que les tribunaux ont dégagé deux interprétations tout à fait différentes mais non équivoques. Considéré isolément, le texte de l'al. 9(1)c) permet de dégager clairement l'intention du législateur. Cette interprétation est compatible avec l'objet de l'ensemble du cadre réglementaire dans le contexte des conventions internationales sur le droit d'auteur, avec l'objet de la *Loi* à l'intérieur de ce cadre et avec le régime établi par la *Loi* elle-même. Les juges et les tribunaux qui ont interprété la disposition différemment l'ont fait pour limiter son application de manière à éviter les conséquences d'ordre pénal, alors que le législateur a manifestement voulu que les actes en question produisent de telles conséquences, comme au moins un des juges souscrivant à cette thèse l'a reconnu expressément dans ses motifs. À mon avis, il faut donner une interprétation alambiquée à cette disposition pour arriver à la conclusion tirée dans *R. c. Love* [(1997), 117 Man. R. (2d) 123 (B.R.)] et dans les décisions qui l'ont suivie.

Le juge Huddart aurait accueilli le pourvoi et rendu le jugement déclaratoire demandé par l'appelante.

V. Les questions en litige

Le présent pourvoi soulève trois questions : 21

1. L'alinéa 9(1)*c*) de la *Loi sur la radiocommunication* interdit-il le décodage de manière absolue, sous réserve d'une exception limitée, ou autorise-t-il le décodage de tous les signaux, sauf ceux pour lesquels il existe un distributeur légitime qui n'a pas donné l'autorisation de le faire?

2. L'alinéa 9(1)*c*) de la *Loi sur la radiocommunication* est-il incompatible avec l'al. 2*b*) de la *Charte canadienne des droits et libertés*?

3. Dans l'affirmative, la disposition législative peut-elle être justifiée au regard de l'article premier de la *Charte*?

VI. Analysis

A. *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. NII 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.*

VI. L'analyse

A. *Introduction*

On peut, sans exagérer, affirmer que l'al. 9(1)*c*) de la *Loi sur la radiocommunication*, une loi fédérale, n'a pas été appliqué de manière uniforme par les tribunaux du pays. D'une part, dans certaines décisions les tribunaux ont interprété cette disposition (ou suggéré qu'elle pouvait l'être) d'une manière ayant pour effet de créer une interdiction absolue, assortie d'une exception limitée, savoir les cas où le distributeur canadien légitime accorde l'autorisation prévue : *R. c. Open Sky Inc.*, [1994] M.J. No. 734 (QL) (C. prov.), par. 36, conf. par (1995), 106 Man. R. (2d) 37 (B.R.) (*sub nom. R. c. O'Connor*), par. 10, demande d'autorisation d'appel à la Cour d'appel refusée pour d'autres motifs (1996), 110 Man. R. (2d) 153 (C.A.); *R. c. King*, [1996] N.B.J. No. 449 (QL) (B.R.), par. 19-20, inf. pour d'autres motifs par (1997), 187 R.N.-B. (2d) 185 (C.A.) (*sub nom. King c. Canada (Attorney General)*); *R. c. Knibb* (1997), 198 A.R. 161 (C. prov.), conf. par [1998] A.J. No. 628 (QL) (B.R.) (*sub nom. R. c. Quality Electronics (Taber) Ltd.*); *ExpressVu Inc. c. NII Norsat International Inc.*, [1998] 1 C.F. 245 (1re inst.), conf. par [1997] A.C.F. nº 1563 (QL) (C.A.); *WIC Premium Television Ltd. c. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628, par. 72; *Canada (Procureure générale) c. Pearlman*, [2001] R.J.Q. 2026 (C.Q.), p. 2034.

D'autre part, on relève un certain nombre de décisions à l'effet contraire, où les tribunaux ont adhéré à l'interprétation plus restrictive retenue en l'espèce par les juges majoritaires de la Cour d'appel de la Colombie-Britannique : *R. c. Love* (1997), 117 Man. R. (2d) 123 (B.R.); *R. c. Ereiser* (1997), 156 Sask. R. 71 (B.R.); *R. c. LeBlanc*, [1997] N.S.J. No. 476 (QL) (C.S.); *Ryan c. 361779 Alberta Ltd.* (1997), 208 A.R. 396 (C. prov.), par. 12; *R. c. Thériault*, [2000] R.J.Q. 2736 (C.Q.), conf. par C.S. Drummondville, nº 405-36-000044-003, 13 juin 2001 (*sub nom. R. c. D'Argy*); *R. c. Gregory Électronique Inc.*, [2000] J.Q. nº 4923 (QL) (C.Q.), conf. par [2001] J.Q. nº 4925 (QL) (C.S.); *R. c. S.D.S. Satellite Inc.*, C.Q. Laval, nº 540-73-000055-980, 31 octobre 2000;

Scullion, [2001] R.J.Q. 2018 (C.Q.); *R. v. Branton* (2001), 53 O.R. (3d) 737 (C.A.).

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.

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.

R. c. Scullion, [2001] R.J.Q. 2018 (C.Q.); *R. c. Branton* (2001), 53 O.R. (3d) 737 (C.A.).

24 Comme on peut le constater, cette divergence d'interprétations ne s'explique pas seulement par le fait que différentes juridictions dans diverses provinces ont adopté des démarches distinctes. Bien que les tribunaux de dernier ressort de la Colombie-Britannique et de l'Ontario se soient prononcés en faveur de l'interprétation restrictive et que ces décisions lient les tribunaux inférieurs de ces provinces, et que la Cour d'appel fédérale ait rendu une décision à l'effet contraire liant la Section de première instance de cette cour, les tribunaux de première instance de l'Alberta, du Manitoba et du Québec ont rendu des décisions inconciliables et il n'y a pas encore, dans ces provinces, d'arrêt contraignant sur la question. Le présent pourvoi offre donc à notre Cour l'occasion d'harmoniser les interprétations discordantes qui existent dans l'ensemble du Canada.

25 En toute déférence, j'estime que la Cour d'appel de la Colombie-Britannique a mal interprété l'al. 9(1)*c*) en tentant de trouver son chemin dans ce dédale de décisions contradictoires. À mon avis, cinq aspects de la décision des juges majoritaires requièrent examen. Premièrement, les juges majoritaires ont commencé leur analyse en tenant pour acquis qu'il y avait ambiguïté. Deuxièmement, ils ont accordé une importance excessive au seul fait qu'un grand nombre de juges avaient divergé d'opinions quant à l'interprétation de l'al. 9(1)*c*). Troisièmement, ils ne se sont pas arrêtés suffisamment à la place de la *Loi sur la radiocommunication* au sein du régime de réglementation de la radiodiffusion au Canada ni pris en considération les objectifs de ce régime, estimant plutôt qu'il était inutile d'examiner ces [TRADUCTION] « questions de principe plus générales ». Quatrièmement, les juges majoritaires n'ont pas interprété le texte anglais de la disposition conformément à sa structure grammaticale, à savoir une interdiction suivie d'une exception limitée. Enfin, ils ont dans les faits inversé les éléments du texte de la disposition, de telle sorte que les signaux dont un distributeur légitime pouvait permettre le décodage (c'est-à-dire l'exception) se trouvaient à définir l'étendue même de l'interdiction.

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, *Stubart 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

B. *L'alinéa 9(1)c) de la Loi sur la radiocommunication interdit-il le décodage de manière absolue, sous réserve d'une exception limitée, ou autorise-t-il le décodage de tous les signaux, sauf ceux pour lesquels il existe un distributeur légitime qui n'a pas donné l'autorisation de le faire?*

(1) Principes d'interprétation législative

Voici comment, à la p. 87 de son ouvrage *Construction of Statutes* (2e éd. 1983), Elmer Driedger a énoncé le principe applicable, de la manière qui fait maintenant autorité :

> [TRADUCTION] Aujourd'hui, il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Notre Cour a à maintes reprises privilégié la méthode moderne d'interprétation législative proposée par Driedger, et ce dans divers contextes : voir, par exemple, *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536, p. 578, le juge Estey; *Québec (Communauté urbaine) c. Corp. Notre-Dame de Bon-Secours*, [1994] 3 R.C.S. 3, p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *R. c. Gladue*, [1999] 1 R.C.S. 688, par. 25; *R. c. Araujo*, [2000] 2 R.C.S. 992, 2000 CSC 65, par. 26; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, par. 33, le juge en chef McLachlin; *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3, par. 27. Je tiens également à souligner que, pour ce qui est de la législation fédérale, le bien-fondé de la méthode privilégiée par notre Cour est renforcé par l'art. 12 de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui dispose que tout texte « est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet ».

Cette méthode reconnaît le rôle important que joue inévitablement le contexte dans l'interprétation par les tribunaux du texte d'une loi. Comme l'a fait remarquer avec perspicacité le professeur John Willis dans son influent article intitulé « Statute Interpretation in a Nutshell » (1938), 16 *R. du B.*

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.)

can. 1, p. 6, [TRADUCTION] « les mots, comme les gens, prennent la couleur de leur environnement ». Cela étant, lorsque la disposition litigieuse fait partie d'une loi qui est elle-même un élément d'un cadre législatif plus large, l'environnement qui colore les mots employés dans la loi et le cadre dans lequel celle-ci s'inscrit sont plus vastes. En pareil cas, l'application du principe énoncé par Driedger fait naître ce que notre Cour a qualifié, dans *R. c. Ulybel Enterprises Ltd.*, [2001] 2 R.C.S. 867, 2001 CSC 56, par. 52, de « principe d'interprétation qui présume l'harmonie, la cohérence et l'uniformité entre les lois traitant du même sujet ». (Voir également *Stoddard c. Watson*, [1993] 2 R.C.S. 1069, p. 1079; *Pointe-Claire (Ville) c. Québec (Tribunal du travail)*, [1997] 1 R.C.S. 1015, par. 61, le juge en chef Lamer.)

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.)

28 D'autres principes d'interprétation — telles l'interprétation stricte des lois pénales et la présomption de respect des « valeurs de la *Charte* » — ne s'appliquent que si le sens d'une disposition est ambiguë. (Voir, relativement à l'interprétation stricte : *Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108, p. 115, le juge Dickson (plus tard Juge en chef du Canada); *R. c. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), p. 59-60; *R. c. Hasselwander*, [1993] 2 R.C.S. 398, p. 413, et *R. c. Russell*, [2001] 2 R.C.S. 804, 2001 CSC 53, par. 46. Je vais examiner plus loin le principe du respect des « valeurs de la *Charte* ».)

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

29 Qu'est-ce donc qu'une ambiguïté en droit? Une ambiguïté doit être « réelle » (*Marcotte*, précité, p. 115). Le texte de la disposition doit être [TRADUCTION] « raisonnablement susceptible de donner lieu à plus d'une interprétation » (*Westminster Bank Ltd. c. Zang*, [1966] A.C. 182 (H.L.), p. 222, lord Reid). Il est cependant nécessaire de tenir compte du « contexte global » de la disposition pour pouvoir déterminer si elle est raisonnablement susceptible de multiples interprétations. Sont pertinents à cet égard les propos suivants, prononcés par le juge Major dans l'arrêt *CanadianOxy Chemicals Ltd. c. Canada (Procureur général)*, [1999] 1 R.C.S. 743, par. 14 : « C'est uniquement lorsque deux ou plusieurs interprétations plausibles, qui s'harmonisent chacune

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.

également avec l'intention du législateur, créent une ambiguïté véritable que les tribunaux doivent recourir à des moyens d'interprétation externes » (je souligne), propos auxquels j'ajouterais ce qui suit : « y compris d'autres principes d'interprétation ».

Voila pourquoi on ne saurait conclure à l'existence d'une ambiguïté du seul fait que plusieurs tribunaux — et d'ailleurs plusieurs auteurs — ont interprété différemment une même disposition. Autant il serait inapproprié de faire le décompte des décisions appuyant les diverses interprétations divergentes et d'appliquer celle qui recueille le « plus haut total », autant il est inapproprié de partir du principe que l'existence d'interprétations divergentes révèle la présence d'une ambiguïté. Il est donc nécessaire, dans chaque cas, que le tribunal appelé à interpréter une disposition législative se livre à l'analyse contextuelle et téléologique énoncée par Driedger, puis se demande si [TRADUCTION] « le texte est suffisamment ambigu pour inciter deux personnes à dépenser des sommes considérables pour faire valoir deux interprétations divergentes » (Willis, *loc. cit.*, p. 4-5).

(2) Application aux faits de l'espèce

Il n'est pas nécessaire, dans chaque cas, d'analyser séparément les divers facteurs d'interprétation énumérés par Driedger et, quoi qu'il en soit, ils sont étroitement liés et interdépendants (*Chieu*, précité, par. 28). Dans le contexte du présent pourvoi, mon analyse est divisée en deux grandes rubriques. Toutefois, avant de l'amorcer, je tiens à mettre en relief un certain nombre d'éléments propres à la présente affaire. Premièrement, nul ne conteste le fait que les signaux des radiodiffuseurs SRD américains sont « encodés » au sens de la Loi, non plus que le fait que ces radiodiffuseurs ne sont pas des « distributeurs légitimes » au sens de la Loi. Deuxièmement, tous les radiodiffuseurs SRD au Canada et aux États-Unis exigent le paiement « d'un prix d'abonnement ou de toute autre forme de redevance » pour l'accès à leurs signaux débrouillés. Enfin, je précise que les mots « alimentation réseau » figurant à l'al. 9(1)*c*) ne sont pas pertinents en l'espèce et qu'on peut en faire abstraction dans l'analyse.

(a) *Grammatical and Ordinary Sense*

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 distributor"). The French version shares the same four features, albeit in a modified order (see Provost C.Q.J. in *Pearlman*, *supra*, at p. 2031).

The forbidden activity is decoding. Therefore, as noted by the Court of Appeal, the prohibition in s. 9(1)(*c*) is directed towards the reception side of the broadcasting equation. Quite apart from the provenance of the signals at issue, where the impugned decoding occurs within Canada, there can be no issue of the statute's having an extraterritorial reach. In the present case, the reception that the appellant seeks to enjoin occurs entirely within Canada.

The object of the prohibition is of central importance to this appeal. What is interdicted by s. 9(1)(*c*) is the decoding of "an encrypted subscription programming signal" (in French, "*un signal d'abonnement*") (emphasis added). The usage of the indefinite article here is telling: it signifies

a) *Sens ordinaire et grammatical*

32 Fondamentalement, l'al. 9(1)*c*) se présente comme une interdiction assortie d'une exception limitée. Je reproduis à nouveau le texte de cette disposition en en soulignant les passages pertinents :

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;

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; [Je souligne.]

La disposition énonce une interdiction générale (« Il est interdit »), qu'elle précise en en indiquant la nature (« décoder ») et l'objet (« un signal d'abonnement ou une alimentation réseau ») et qu'elle assortit d'une exception (« sans l'autorisation de leur distributeur légitime ») : voir *Pearlman*, précité, p. 2031. La version anglaise énonce elle aussi ces quatre éléments, quoique dans un ordre légèrement différent.

33 L'activité interdite est le décodage. Par conséquent, comme l'a fait remarquer la Cour d'appel, l'interdiction prévue à l'al. 9(1)*c*) vise l'aspect réception de la radiodiffusion. Indépendamment de la provenance des signaux, lorsque le décodage reproché a lieu au Canada, la question de la possible portée extraterritoriale de la Loi ne se soulève pas. Dans la présente affaire, la réception dont l'appelante demande l'interdiction se produit entièrement au Canada.

34 L'objet de l'interdiction revêt une importance cruciale dans le présent pourvoi. Aux termes de l'al. 9(1)*c*), il est interdit de décoder « un signal d'abonnement » (en anglais « *an encrypted subscription programming signal* ») (je souligne). L'emploi de l'article indéfini est révélateur. Le mot « un »

"one, some [or] any" (*Canadian Oxford Dictionary* (1998), at p. 1). Thus, what is prohibited is the decoding of any encrypted subscription programming signal, subject to the ensuing exception.

35 The definition of "subscription programming signal" suggests that the prohibition extends to signals emanating from other countries. Section 2 of the Act defines that term as, "radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge" (emphasis added). I respectfully disagree with the respondents and Weiler J.A. in *Branton*, *supra*, at para. 26, "that the wording 'or elsewhere' is limited to the type of situation contemplated in s. 3(3)" of the Act. Section 3(3) reads:

3. . . .

(3) This Act applies within Canada and on board

(*a*) any ship, vessel or aircraft that is

(i) registered or licensed under an Act of Parliament, or

(ii) owned by, or under the direction or control of, Her Majesty in right of Canada or a province;

(*b*) any spacecraft that is under the direction or control of

(i) Her Majesty in right of Canada or a province,

(ii) a citizen or resident of Canada, or

(iii) a corporation incorporated or resident in Canada; and

(*c*) any platform, rig, structure or formation that is affixed or attached to land situated in the continental shelf of Canada.

36 This provision is directed at an entirely different issue from that which is at play in the definition of "subscription programming signal". Section 3(3) specifies the geographic scope of the *Radiocommunication Act* and all its constituent

a notamment le sens suivant : « . . . **2** (Avec une valeur générale au sens de "tous les") . . . » (*Le Grand Robert de la langue française* (2e éd. 2001), t. 6, p. 1607). La loi interdit donc de décoder tous les signaux d'abonnement, sous réserve de l'exception prévue.

La définition de « signal d'abonnement » tend à indiquer que l'interdiction frappe également les signaux émanant d'autres pays. Cette expression est définie ainsi à l'art. 2 de la Loi : « Radiocommunication destinée à être reçue, directement ou non, par le public au Canada ou ailleurs ["*or elsewhere*" dans la version anglaise] moyennant paiement d'un prix d'abonnement ou de toute autre forme de redevance » (je souligne). En toute déférence, je ne souscris ni à la thèse des intimés ni à l'opinion exprimée par madame le juge Weiler de la Cour d'appel dans l'affaire *Branton*, précitée, par. 26, selon laquelle [TRADUCTION] « les termes "*or elsewhere*" ne visent que le genre de situations envisagées au par. 3(3) » de la Loi, dont voici le texte :

3. . . .

(3) La présente loi s'applique au Canada et à bord :

a) d'un navire, bâtiment ou aéronef soit immatriculé ou faisant l'objet d'un permis aux termes d'une loi fédérale, soit appartenant à Sa Majesté du chef du Canada ou d'une province, ou placé sous sa responsabilité;

b) d'un véhicule spatial placé sous la responsabilité de Sa Majesté du chef du Canada ou d'une province, ou de celle d'un citoyen canadien, d'un résident du Canada ou d'une personne morale constituée ou résidant au Canada;

c) d'une plate-forme, installation, construction ou formation fixée au plateau continental canadien.

Cette disposition vise une situation tout à fait différente de celle visée par la définition de « signal d'abonnement ». Le paragraphe 3(3) précise la portée géographique de la *Loi sur la radiocommunication* et de toutes les dispositions qui la composent,

provisions, as is confirmed by the marginal note accompanying the subsection, which states "Geographical application". To phrase this in the context of the present appeal, any person within Canada or on board any of the things enumerated in ss. 3(3)(*a*) through (*c*) could potentially be subject to liability for unlawful decoding under s. 9(1)(*c*); in this way, s. 3(3) addresses the "where" question. On the other hand, the definition of "subscription programming signal" provides meaning to the s. 9(1)(*c*) liability by setting out the class of signals whose unauthorized decoding will trigger the provision; this addresses the object of the prohibition, or the "what" question. These are two altogether separate issues.

Furthermore, it was not necessary for Parliament to include the phrase "or elsewhere" in the s. 2 definition if it merely intended "subscription programming signal" to be interpreted as radiocommunication intended for direct or indirect reception by the public on board any of the s. 3(3) vessels, spacecrafts or rigs. In my view, the words "or elsewhere" were not meant to be tautological. It is sometimes stated, when a court considers the grammatical and ordinary sense of a provision, that "[t]he legislator does not speak in vain" (*Quebec (Attorney General) v. 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.

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

comme le confirme la note marginale « Application géographique ». Si l'on reformule cette explication dans le contexte du présent pourvoi, cela signifie que quiconque se trouve au Canada ou à bord de l'une des choses énumérées aux al. 3(3)*a*) à *c*) est susceptible de se voir reprocher l'infraction de décodage illégal prévue à l'al. 9(1)*c*); en ce sens, le par. 3(3) aide à répondre à la question de savoir « où » s'applique la loi. Par ailleurs, la définition de « signal d'abonnement » précise dans quel cas une personne engage sa responsabilité au titre de l'al. 9(1)*c*) en indiquant la catégorie de signaux dont le décodage non autorisé déclenche l'application de cette disposition; cela permet de répondre à la question de l'objet de l'interdiction, la question du « quoi ». Il s'agit de deux questions tout à fait distinctes.

37 En outre, le législateur n'aurait pas eu besoin d'inclure les mots « ou ailleurs » en français à la définition de « signal d'abonnement » à l'art. 2 (et « *or elsewhere* » en anglais) s'il avait seulement voulu que cette expression s'entende d'une radiocommunication destinée à être reçue directement ou non par le public à bord des bâtiments, véhicules spatiaux ou installations visés au par. 3(3). À mon avis, l'emploi de ces mots ne se voulait pas tautologique. On affirme parfois, lorsqu'un tribunal se penche sur le sens ordinaire et grammatical d'une disposition, que « [l]e législateur ne parle pas pour ne rien dire » (*Québec (Procureur général) c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838). Le législateur l'a confirmé expressément en édictant l'art. 10 de la *Loi d'interprétation*, qui précise notamment que « [l]a règle de droit a vocation permanente ». Quoi qu'il en soit, l'expression « ou ailleurs » en français (« *or elsewhere* » en anglais) évoque un champ d'application beaucoup plus vaste que celui correspondant aux exemples restreints énumérés au par. 3(3), et je serais réticent à établir une équivalence entre les deux.

38 Par conséquent, je suis d'avis que la définition de « signal d'abonnement » vise les signaux émanant de distributeurs étrangers et destinés à être reçus par un public étranger. Rappelons que, puisque la *Loi sur la radiocommunication* n'interdit pas la radiodiffusion de signaux d'abonnement (exception faite de l'al. 9(1)*e*) qui interdit la retransmission non

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

autorisée au Canada de tels signaux) et ne s'applique qu'au décodage survenant aux endroits prévus au par. 3(3), la présente affaire ne soulève aucune question touchant à l'exercice extraterritorial de certains pouvoirs. À ce stade-ci de l'analyse, cela signifie, contrairement à la conclusion du juge siégeant en chambre et à celle des juges majoritaires de la Cour d'appel, que le législateur a en fait choisi, à l'al. 9(1)*c*), un libellé interdisant le décodage de tous les signaux d'abonnement, indépendamment de leur origine, « sans l'autorisation de leur distributeur légitime ou en contravention avec celle-ci ». Je vais maintenant examiner cette exception.

La Cour d'appel a invoqué la présence de l'article défini à la fin du texte anglais de l'al. 9(1)*c*) (« *the signal* ») au soutien de son interprétation restrictive de cette disposition. Devant notre Cour, l'avocat des intimés a également fait valoir que la présence de l'article défini « *the* » qui précède les mots « *lawful distributor* » confirme que la disposition [TRADUCTION] « n'est censée s'appliquer que lorsqu'il existe un distributeur légitime ». Enfin, les intimés ont attiré notre attention sur le texte de la version française de la disposition et, en particulier, sur la présence du déterminant possessif « leur » avant les mots « distributeur légitime » : dans un certain nombre d'affaires où l'on a analysé la version française de l'al. 9(1)*c*), le tribunal a fondé son interprétation restrictive sur l'emploi de ce mot (voir les décisions suivantes de la Cour du Québec : *Thériault*, précitée, p. 2739; *Gregory Électronique*, précitée, par. 24-26, et *S.D.S. Satellite*, précitée, p. 7. Voir également l'affaire *Branton*, précitée, par. 25).

Je ne partage pas ces opinions. L'adjectif possessif « leur » et l'article défini « *the* » ne font qu'identifier la partie qui peut autoriser le décodage conformément à l'exception prévue (voir *Pearlman*, précité, p. 2032). En conséquence, bien que je souscrive à l'opinion de la majorité de la Cour d'appel selon laquelle, [TRADUCTION] « [s]i un signal d'abonnement n'a pas de distributeur légitime au Canada, personne ne saurait être autorisé à en permettre le décodage », je ne vois pas comment il s'ensuit nécessairement que le décodage de signaux non assujettis à la

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."

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.

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" ("*légitimement 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

réglementation « ne peut de ce fait contrevenir à la *Loi sur la radiocommunication* » (par. 36). Pareille conclusion exigerait que l'on intègre à l'interdiction certains mots de l'exception, ce qui constituerait une démarche circulaire et erronée. Je vais me référer à nouveau à la décision du juge Provost, de la Cour du Québec, dans l'affaire *Pearlman*, précitée, p. 2031 : « Rechercher d'abord l'exception et définir ensuite le principe par rapport à l'exception risquent de fausser le sens du texte et de trahir l'intention de son rédacteur. »

41 À mon avis, les articles définis employés dans la version anglaise de l'exception prévue à l'al. 9(1)*c*) servent à identifier, parmi le genre de signaux touchés par l'interdiction (tous les signaux d'abonnement), ceux pour lesquels la règle cède le pas à l'exception. Du point de vue grammatical, donc, le choix d'articles définis et indéfinis donne essentiellement lieu à l'interprétation suivante : Il est interdit à quiconque de décoder quelque (indéfini) signal d'abonnement que ce soit à moins d'avoir obtenu, pour le (défini) signal en cause, l'autorisation du (défini) distributeur légitime. Par conséquent, comme cela peut arriver, s'il n'existe aucun distributeur légitime susceptible d'accorder cette autorisation, l'interdiction générale doit continuer à produire ses effets.

42 Bien que j'aie déjà indiqué que, dans la présente affaire, les distributeurs SRD américains ne sont pas des « distributeurs légitimes » au sens de la Loi, il convient d'analyser cette expression, car elle est importante dans le processus d'interprétation. Aux termes de l'art. 2, « distributeur légitime » s'entend de « [l]a personne légitimement autorisée, au Canada, à transmettre un signal d'abonnement [. . .] et à en permettre le décodage ». À cet égard, le seul fait qu'une personne soit autorisée dans un autre pays à transmettre des signaux n'a pas pour effet de faire de celle-ci le distributeur légitimement autorisé de ces signaux au Canada. En outre l'expression « légitimement autorisée » (« *lawful right* ») suppose le respect d'autres conditions que la seule obtention d'une licence du CRTC. En définissant ce terme, le législateur aurait pu mentionner expressément qu'il s'agit d'une personne titulaire d'une licence délivrée par le CRTC (comme il l'a fait

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

à l'al. 18(1)*c*)) ou par le ministre (al. 5(1)*a*)). Il a plutôt opté pour une formulation plus générale. En conséquence, je partage l'opinion suivante, exprimée par le juge Létourneau de la Cour d'appel fédérale dans l'affaire *Norsat*, précitée, par. 4 :

> La personne « légitimement autorisée » est celle qui possède les droits réglementaires en vertu de la licence qui lui est régulièrement délivrée conformément à la Loi, l'autorisation du Conseil de la radiodiffusion et des télécommunications canadiennes ainsi que les droits contractuels et les droits d'auteur se rapportant nécessairement au contenu qu'implique la transmission d'un signal d'abonnement ou d'une alimentation réseau.

Comme l'a fait remarquer le procureur général du Canada, cette interprétation signifie que, même lorsque la transmission du signal d'abonnement n'est pas visée par la définition de « radiodiffusion » au sens de la *Loi sur la radiodiffusion* (c'est-à-dire lorsque la transmission d'émissions est « destinée à la présentation dans un lieu public seulement ») et qu'aucune licence de radiodiffusion n'est donc requise, d'autres facteurs doivent être pris en considération pour déterminer si le transmetteur du signal est un « distributeur légitime » pour l'application de la *Loi sur la radiocommunication*.

En fin de compte, j'arrive à la conclusion que, lorsqu'on interprète les mots utilisés à l'al. 9(1)*c*) suivant leur sens ordinaire et grammatical et en tenant compte des définitions de l'art. 2, cette disposition a pour effet d'interdire à quiconque de décoder au Canada tout signal d'abonnement brouillé — quelle que soit son origine — à moins d'avoir obtenu la permission de le faire de la personne légitimement autorisée, suivant le droit canadien, à transmettre le signal concerné et à en permettre le décodage.

b) *Contexte élargi*

Bien que la *Loi sur la radiocommunication* ne comporte malheureusement pas de disposition précisant son objet, elle s'inscrit dans un cadre plus large. Elle établit principalement les règles relatives à l'attribution de fréquences de radiocommunication définies, aux autorisations de posséder et d'utiliser des appareils radio et à la réglementation technique du spectre des radiofréquences. La Loi

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.

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.

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

établit également des restrictions applicables en matière de réception et de brouillage des radiocommunications, y compris le type de signaux d'abonnement en litige dans le présent pourvoi. S. Handa et autres, dans *Communications Law in Canada* (feuilles mobiles), p. 3.8, disent de la *Loi sur la radiocommunication* qu'elle est l'un [TRADUCTION] « des trois piliers législatifs régissant la distribution au Canada ». Ils ajoutent ce qui suit, à la p. 3.17 :

> [TRADUCTION] La *Loi sur la radiocommunication* régit toutes les utilisations privées et publiques du spectre des radiofréquences. Le lien étroit unissant cette loi et celles relatives aux télécommunications et à la radiodiffusion tient au fait que les télécommunications et la radiodiffusion sont les deux principaux domaines d'utilisation du spectre des radiofréquences.

45 Entrée en vigueur en 1991, la *Loi sur la radiodiffusion* est une loi omnibus qui a également apporté des modifications substantielles à la *Loi sur la radiocommunication*, notamment par l'ajout de l'al. 9(1)*c*). Elle a pour objet général de réglementer et de surveiller la transmission d'émissions au public canadien. Un aspect important à signaler dans le cadre du présent pourvoi est le fait que la transmission d'émissions encodées dont il est question en l'espèce est visée par la définition de « radiodiffusion » dans la *Loi sur la radiodiffusion* et que les radiodiffuseurs SRD, telle l'appelante, sont assujettis à cette loi et obtiennent leur licence sous son régime. Sont énoncés, aux al. 3(1)*a*) à *t*) de la *Loi sur la radiodiffusion*, 20 objectifs généraux de la politique canadienne de radiodiffusion. Toutefois, la loi met l'accent sur la radiodiffusion, et non sur la réception.

46 En fin de compte, ces lois s'appliquent en tandem. À cet égard, je souscris aux propos suivants du juge LeGrandeur de la Cour provinciale de l'Alberta dans l'affaire *Knibb*, précitée, par. 38-39, qu'a fait siens le juge Gibson de la Section de première instance de la Cour fédérale dans *Norsat*, précité, par. 35 :

> [TRADUCTION] La *Loi sur la radiodiffusion* et la *Loi sur la radiocommunication* doivent être considérées comme fonctionnant dans le cadre d'un seul régime réglementaire. Les dispositions de chaque loi doivent

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

donc être lues en tenant compte de leurs contextes réciproques et il faut tenir compte du rôle de chaque loi dans le régime général. [Renvoi à R. Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994), p. 286.]

Selon moi, l'ajout des al. 9(1)*c*), *d*) et *e*) et d'autres dispositions à la *Loi sur la radiocommunication*, par l'intermédiaire des dispositions de la *Loi sur la radiodiffusion* de 1991, appuie cette méthode d'interprétation. Les alinéas 9(1)*c*), *d*) et *e*) de la *Loi sur la radiocommunication* doivent être considérés comme faisant partie du mécanisme par lequel doit être mise en œuvre la politique de réglementation de la radiodiffusion au Canada qui y est énoncée.

La politique canadienne de radiodiffusion possède un certain nombre de caractéristiques propres et elle établit une orientation incontestablement axée sur la culture. Il y est déclaré qu'au Canada les radiofréquences sont du domaine public, qu'il est fondamental que le système de radiodiffusion soit la propriété des Canadiens et sous leur contrôle et que la programmation offerte par le système de radiodiffusion est « un service public essentiel pour le maintien et la valorisation de l'identité nationale et de la souveraineté culturelle ». Les alinéas 3(1)*d*) et *t*) énoncent un certain nombre d'objectifs de mise en œuvre précis à l'intention du système de radiodiffusion en général, et des entreprises de distribution en particulier (y compris les entreprises de distribution SRD). Enfin, le par. 3(2) dispose que « le système canadien de radiodiffusion constitue un système unique » dont il convient de confier la réglementation et la surveillance « à un seul organisme public autonome ».

Dans ce contexte, peu d'éléments appuient une interprétation restrictive de l'al. 9(1)*c*). En effet, comme l'a soutenu devant nous l'avocat du procureur général du Canada, après examen de la politique canadienne de radiodiffusion adoptée par le législateur, l'on peut à juste titre poser les questions suivantes :

[TRADUCTION] Pourquoi le législateur aurait-il adopté une disposition correspondant à l'interprétation restrictive préconisée en l'espèce? Pourquoi le législateur aurait-il précisé que le système doit être la propriété des Canadiens et pourvu à la production canadienne et

in and sweep all of that aside? What purpose would have been served?

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.

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.

au contenu canadien de la radiodiffusion, puis tout bonnement laisser les radiodiffuseurs étrangers non assujettis à la réglementation s'amener sur le marché et faire fi de toutes ces exigences? Quelle fin aurait alors été servie?

49 Par contre, l'interprétation de l'al. 9(1)*c*) qui, à mon avis, découle du sens ordinaire et grammatical des mots utilisés dans cette disposition s'accorde bien avec les objectifs de la *Loi sur la radiodiffusion*. Le fait que les radiodiffuseurs SRD encodent leurs signaux, permettant ainsi la concentration des mesures de réglementation sur les aspects réception et décodage du système, contribue d'ailleurs à la réalisation des objectifs de la politique de radiodiffusion établis par la loi, ainsi qu'à la réglementation et à la surveillance du système canadien de radiodiffusion en tant que système unique. Dans ces circonstances, il est logique que le législateur ait voulu inciter les radiodiffuseurs à se plier au processus réglementaire en disposant qu'ils ne peuvent autoriser le décodage de leurs signaux et percevoir en contrepartie un prix d'abonnement qu'après avoir obtenu les approbations requises des autorités compétentes.

50 Il existe un autre facteur contextuel qui, bien qu'il ne soit en aucune manière déterminant, confirme l'interprétation selon laquelle l'al. 9(1)*c*) établit une interdiction absolue assortie d'une exception limitée. Comme je l'ai souligné précédemment, l'expression « légitimement autorisée » figurant dans la définition de « distributeur légitime » intègre des aspects touchant au droit des contrats et au droit d'auteur. Selon la preuve versée au dossier, les accords commerciaux liant l'appelante et ses divers fournisseurs d'émissions stipulent que l'appelante doit respecter les droits accordés à ces fournisseurs par les titulaires du droit d'auteur sur le contenu des émissions. Les droits qu'acquièrent ainsi les fournisseurs permettent la radiodiffusion des émissions dans des régions données, que ce soit à la grandeur du Canada ou dans une partie du pays. En conséquence, l'appelante n'est pas légitimement autorisée à permettre le décodage de ses signaux d'abonnement à l'extérieur du champ d'application géographique du droit de présenter sa programmation que lui accorde le contrat.

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.

Ainsi, le titulaire du droit d'auteur sur la programmation peut conclure des contrats de licence distincts dans des régions différentes ou dans des pays différents (par exemple au Canada et aux États-Unis). Il semble d'ailleurs que de tels arrangements soient monnaie courante dans ce secteur d'activité. Dans la présente affaire, le radiodiffuseur SRD américain DIRECTV a plaidé la même interprétation de l'al. 9(1)*c*) que celle préconisée par l'appelante, en partie à cause de la responsabilité à laquelle il s'expose tant vis-à-vis des titulaires du droit d'auteur aux États-Unis que des titulaires de licence au Canada du fait que ses signaux débordent la frontière et sont décodés au 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.

J'estime également que le fait de considérer que l'al. 9(1)*c*) établit une interdiction absolue assortie d'une exception limitée complète le régime établi par la *Loi sur le droit d'auteur*. Les alinéas 21(1)*c*) et *d*) de cette loi confèrent au radiodiffuseur, à l'égard du signal de communication qu'il émet, un droit d'auteur comportant le droit exclusif de le retransmettre (sous réserve des exceptions prévues au par. 31(2)) et, dans le cas d'un signal de communication télévisuel, de l'exécuter en public moyennant droit d'entrée. Si l'on considère que l'al. 9(1)*c*) a pour effet d'interdire absolument tout décodage, sauf avec la permission de la personne légitimement autorisée à transmettre le signal concerné et à en permettre le décodage, la protection de cette disposition s'étend également aux titulaires des droits d'auteur sur la programmation elle-même, puisqu'il interdit la réception non autorisée de tout signal violant le droit d'auteur, même s'il n'y a ni retransmission ni reproduction : voir F. P. Eliadis et S. C. McCormack, « Vanquishing Wizards, Pirates and Musketeers : The Regulation of Encrypted Satellite TV Signals » (1993), 3 *M.C.L.R.* 211, p. 213-218. Enfin, je signale que les recours civils prévus à l'al. 18(1)*a*) et au par. 18(6) de la *Loi sur la radiocommunication* indiquent que les questions touchant au droit d'auteur sont pertinentes pour l'application de celle-ci, facteur qui appuie la conclusion selon laquelle il existe un lien entre cette loi et celle sur le droit d'auteur.

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

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.

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"

c) *L'alinéa 9(1)c) en tant que disposition « quasi pénale »*

53 Je tiens à commenter l'argument des intimés relatif aux conséquences pénales qu'entraînerait l'interprétation voulant que la disposition en cause constitue une « interdiction absolue ». Bien que la présente affaire découle d'un recours civil exercé par l'appelante en vertu du par. 18(1) de la Loi (en qualité de personne qui « a subi une perte ou des dommages par suite d'une contravention [à l']aliné[a] 9(1)*c*) ») et ne fasse donc pas intervenir directement les aspects pénaux de cette loi, les intimés invitent notre Cour à se pencher sur l'al. 10(1)*b*) et le par. 10(2.1) de la *Loi sur la radiocommunication*. Suivant chacune de ces dispositions, commet une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque fournit du matériel en vue d'enfreindre l'art. 9 et quiconque contrevient dans les faits à l'al. 9(1)*c*). Devant nous, l'avocat des intimés a plaidé que, si l'al. 9(1)*c*) est interprété de la manière suggérée par l'appelante, [TRADUCTION] « des centaines de milliers de canadiens peuvent s'attendre à recevoir de la visite, puisqu'ils enfreindront la loi » et que « les arguments [de l'appelante] ont pour effet de transformer les abonnés en criminels, et ce même s'ils paient jusqu'au dernier cent les sommes auxquelles a droit DIRECTV ». Essentiellement, l'intimé prétend que la présence de l'al. 10(1)*b*) et du par. 10(2.1) dans la *Loi sur la radiocommunication* constitue un élément contextuel important pour l'interprétation de l'al. 9(1)*c*) et que cet élément milite en faveur de sa thèse.

54 L'alinéa 9(1)*c*) a effectivement un « caractère hybride », dans la mesure où son application emporte des sanctions civiles et des sanctions pénales. Cependant, je ne suis pas convaincu que ce facteur joue un rôle important dans le processus d'interprétation en l'espèce. Quoi qu'il en soit, je ne crois pas qu'il soit exact d'insinuer que la décision rendue dans le présent pourvoi aura pour effet de transformer sur-le-champ en criminels les résidants canadiens qui sont abonnés à des services SRD américains et paient leur abonnement. L'infraction d'ordre pénal créée par l'al. 10(1)*b*) doit être commise dans des circonstances « donnant à penser que

(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

[tout matériel ou dispositif, ou composante de celui-ci] est utilisé en vue d'enfreindre l'article 9, l'a été ou est destiné à l'être » (je souligne). De plus, l'alinéa 10(1)*b*) permet à la personne à qui on reproche cette infraction de plaider l'« excuse légitime » en défense. En outre, le par. 10(2.5) dispose que « [n]ul ne peut être déclaré coupable de l'infraction visée [à l'alinéa] 9(1)*c*) [. . .] s'il a pris les mesures nécessaires pour l'empêcher ». Comme il n'est ni nécessaire ni opportun de s'interroger sur le sens de ces dispositions en l'absence du contexte factuel approprié, je m'abstiendrai de le faire.

d) *Conclusion*

Après examen du contexte global de l'al. 9(1)*c*) et interprétation des mots qui le composent suivant leur sens ordinaire et grammatical, en conformité avec le cadre législatif dans lequel s'inscrit cette disposition, j'arrive à la conclusion que celle-ci ne recèle aucune ambiguïté. Je ne peux que conclure que le législateur entendait interdire de manière absolue aux résidants du Canada de décoder des signaux d'abonnement encodés. La seule exception à cette interdiction est le cas où l'intéressé a obtenu l'autorisation de le faire du distributeur détenant au Canada les droits requis pour transmettre le signal concerné et en permettre le décodage. Il n'est pas nécessaire, dans les circonstances, de recourir à l'un ou l'autre des principes subsidiaires d'interprétation législative.

C. *Les questions constitutionnelles*

Comme je vais le préciser ci-après, je n'entends pas répondre aux questions constitutionnelles formulées dans le cadre du présent pourvoi.

L'article 32 des *Règles de la Cour suprême du Canada*, DORS/83-74, requiert la formulation de questions constitutionnelles dans tout pourvoi où la validité ou l'applicabilité constitutionnelle d'une loi est contestée, en plus d'établir les exigences procédurales à respecter à cette fin. Comme l'a reconnu notre Cour, la règle 32 vise à faire en sorte que le procureur général du Canada, les procureurs généraux des provinces et les ministres de la Justice des territoires soient informés de toute contestation constitutionnelle et puissent décider s'il y a lieu

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.

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.

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*,

ou non qu'ils interviennent : *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, par. 49, le juge L'Heureux-Dubé; voir également B. A. Crane et H. S. Brown, *Supreme Court of Canada Practice 2000* (1999), p. 253. La règle 32 a également pour objet d'informer les parties et d'éventuels intervenants des questions constitutionnelles soumises à la Cour.

58 De façon générale, le Juge en chef ou un autre juge de notre Cour accorde aux parties à un pourvoi une « grande latitude » dans la formulation des questions constitutionnelles : *Bisaillon c. Keable*, [1983] 2 R.C.S. 60, p. 71; *Corbiere*, précité, par. 48. Cette grande latitude est particulièrement pertinente dans une affaire comme celle qui nous occupe, où ce sont les intimés qui ont présenté la requête sollicitant la formulation des questions constitutionnelles. Généralement, l'intimé peut avancer, en appel, tout argument tendant à justifier la décision du tribunal d'instance inférieure (*Perka c. La Reine*, [1984] 2 R.C.S. 232, p. 240; *Idziak c. Canada (Ministre de la Justice)*, [1992] 3 R.C.S. 631, p. 643-644, le juge Cory). Toutefois, comme bien d'autres règles d'ordre général, cette règle souffre une exception. L'intimé, comme toute autre partie d'ailleurs, ne peut invoquer un argument entièrement nouveau qui aurait nécessité la production d'éléments de preuve additionnels au procès : *Perka*, précité; *Idziak*, précité; *R. c. Gayle* (2001), 54 O.R. (3d) 36 (C.A.), par. 69, autorisation de pourvoi refusée le 24 janvier 2002, [2002] 1 R.C.S. vii.

59 Par ailleurs, même lorsque des questions constitutionnelles sont formulées conformément à la règle 32, il peut en bout de ligne arriver que le dossier factuel constitué en appel soit insuffisant pour permettre de trancher ces questions. En pareil cas, notre Cour n'est pas tenue de répondre aux questions formulées : *Bisaillon*, précité; Crane et Brown, *op. cit.*, p. 254. En fait, il existe des raisons impérieuses de ne pas répondre à de telles questions : bien que notre Cour s'abstienne généralement de se prononcer sur des questions abstraites, « [c]ette politique [. . .] revêt une importance particulière dans les affaires constitutionnelles » (*Moysa c. Alberta (Labour Relations Board)*, [1989] 1 R.C.S. 1572, p.

[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.

1580; voir également *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086, p. 1099; *Baron c. Canada*, [1993] 1 R.C.S. 416, p. 452; *R. c. Mills*, [1999] 3 R.C.S. 668, par. 38, les juges McLachlin et Iacobucci). En conséquence, comme l'a dit le juge Sopinka au nom de notre Cour dans *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342, p. 357 : « La procédure établie par l'art. 32 des *Règles de la Cour suprême* ne vise pas à introduire de nouvelles questions, mais à définir avec précision les questions constitutionnelles litigieuses qui ressortent du dossier » (je souligne).

Au cours des plaidoiries, l'avocat des intimés a à juste titre concédé que le dossier ne renferme pas d'éléments relatifs à la *Charte* propres à permettre à notre Cour de se prononcer sur les questions formulées. Il a plutôt fait valoir que les « valeurs de la *Charte* » devaient éclairer l'interprétation de la *Loi sur la radiocommunication*. Dans la mesure où cet argument est présenté comme une proposition indépendante, il doit être rejeté. Bien que j'aie déjà exposé la démarche à privilégier en matière d'interprétation législative, il y a lieu d'y revenir, étant donné la manière dont les intimés voudraient que notre Cour tienne compte de la *Charte* et l'applique.

Il est depuis longtemps admis que, lorsqu'il leur est possible de le faire sans perturber le juste équilibre entre l'action judiciaire et l'action législative, les tribunaux doivent appliquer et faire évoluer les règles de la common law en conformité avec les valeurs et principes consacrés par la *Charte* : *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, p. 603, le juge McIntyre; *Cloutier c. Langlois*, [1990] 1 R.C.S. 158, p. 184; *R. c. Salituro*, [1991] 3 R.C.S. 654, p. 675; *R. c. Golden*, [2001] 3 R.C.S. 679, 2001 CSC 83, par. 86, les juges Iacobucci et Arbour; *S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 R.C.S. 156, 2002 CSC 8, par. 18-19. Il faut évidemment se rappeler que la common law ressortit au pouvoir judiciaire. En effet les tribunaux sont chargés d'appliquer la common law et de veiller à ce qu'elle continue de refléter les valeurs fondamentales de la société. Cependant, ils ne jouent pas le même rôle vis-à-vis du droit d'origine législative.

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" (Sullivan, *supra*, at p. 325), it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.

62 Les textes législatifs sont l'expression de la volonté du législateur. Ils complètent, modifient ou remplacent la common law. Plus précisément, lorsqu'une loi est en jeu dans une instance judiciaire, il incombe au tribunal (sauf contestation fondée sur des motifs d'ordre constitutionnel) de l'interpréter et de l'appliquer conformément à l'intention souveraine du législateur. À cet égard, bien qu'on affirme parfois qu'[TRADUCTION] « il convient que les tribunaux privilégient les interprétations tendant à favoriser les principes et les valeurs consacrés par la *Charte* plutôt que celles qui n'ont pas cet effet » (Sullivan, *op. cit.*, p. 325), il importe de souligner le fait que, dans la mesure où notre Cour a reconnu un principe d'interprétation fondé sur le respect des « valeurs de la *Charte* », ce principe ne s'applique uniquement qu'en cas d'ambiguïté véritable, c'est-à-dire lorsqu'une disposition législative se prête à des interprétations divergentes mais par ailleurs tout aussi plausibles l'une que l'autre.

This Court has striven to make this point clear on many occasions: see, e.g., *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 558, *per* L'Heureux-Dubé J.; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078, *per* Lamer J. (as he then was); *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 771, *per* McLachlin J. (as she then was); *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *Mossop*, *supra*, at pp. 581-82, *per* Lamer C.J.; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 66, *per* Cory J.; *Mills*, *supra*, at paras. 22 and 56; *Sharpe*, *supra*, at para. 33.

63 Notre Cour s'est efforcée d'exprimer clairement ce principe à de nombreuses reprises : voir, par exemple, *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, p. 558, le juge L'Heureux-Dubé; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, p. 1078, le juge Lamer (plus tard Juge en chef); *R. c. Zundel*, [1992] 2 R.C.S. 731, p. 771, le juge McLachlin (maintenant Juge en chef); *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, p. 660; *Mossop*, précité, p. 581-582, le juge en chef Lamer; *R. c. Lucas*, [1998] 1 R.C.S. 439, par. 66, le juge Cory; *Mills*, précité, par. 22 et 56; *Sharpe*, précité, par. 33.

These cases recognize that a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. Moreover, another rationale for restricting the "*Charter* values" rule was expressed in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 752:

64 Dans ces arrêts, notre Cour reconnaît qu'appliquer une présomption générale de conformité à la *Charte* pourrait parfois contrecarrer le respect de l'intention véritable du législateur, contrairement à ce que prescrit la démarche privilégiée en matière d'interprétation législative. Dans l'arrêt *Symes c. Canada*, [1993] 4 R.C.S. 695, p. 752, la Cour a énoncé une raison supplémentaire justifiant de limiter l'application de la règle d'interprétation fondée sur le respect des « valeurs de la *Charte* » :

[T]o consult the *Charter* in the absence of such ambiguity is to deprive the *Charter* of a more powerful purpose, namely, the determination of a statute's constitutional

[C]onsulter la *Charte* en l'absence d'une telle ambiguïté la prive d'un objet plus important, la détermination de la constitutionnalité d'une loi. Si les dispositions

validity. If statutory meanings must be made congruent with the *Charter* even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the *Charter*. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the *Charter*, since the interpretive process would preclude one from finding infringements in the first place. [Emphasis in original.]

(See also *Willick v. Willick*, [1994] 3 S.C.R. 670, at pp. 679-80, *per* Sopinka J.)

65 This last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 136-42, the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on *Charter* grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. "The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*)" (*Vriend*, *supra*, at para. 139).

66 To reiterate what was stated in *Symes*, *supra*, and *Willick*, *supra*, if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret this sort of enactment in light of *Charter* principles. The patent unworkability of

législatives devaient être rendues compatibles avec la *Charte* même en l'absence d'ambiguïté, alors il ne serait jamais possible d'appliquer, plutôt que de simplement consulter, les valeurs de la *Charte*. En outre, le gouvernement ne pourrait jamais justifier une atteinte à la *Charte* comme une limite raisonnable en vertu de l'article premier puisque le processus d'interprétation empêcherait initialement de conclure à l'existence d'une atteinte à la *Charte*. [Souligné dans l'original.]

(Voir également *Willick c. Willick*, [1994] 3 R.C.S. 670, p. 679-680, le juge Sopinka.)

Fondamentalement, ce dernier point évoque la question du rôle que doivent jouer les tribunaux au sein de la démocratie canadienne. Dans l'arrêt *Vriend c. Alberta*, [1998] 1 R.C.S. 493, par. 136-142, notre Cour a dit que dialogue et respect mutuels devaient être au cœur des rapports entre les pouvoirs législatif, exécutif et judiciaire. Elle a ajouté que le contrôle judiciaire fondé sur des motifs prévus par la *Charte* confère une certaine vitalité au processus démocratique en ce qu'il favorise à la fois l'interaction dynamique et la responsabilité entre ces divers pouvoirs. « Les tribunaux examinent le travail du législateur, et le législateur réagit aux décisions des tribunaux en adoptant d'autres textes de loi (ou même en se prévalant de l'art. 33 de la *Charte* pour les soustraire à la *Charte*) » (*Vriend*, précité, par. 139).

Pour rappeler ce qui a été dit dans les arrêts *Symes* et *Willick*, précités, si les tribunaux devaient interpréter toutes les lois de manière à faire en sorte qu'elles soient conformes à la *Charte*, cela perturberait à tort l'équilibre dialogique. Chaque fois que ce principe serait appliqué, il préviendrait tout contrôle judiciaire fondé sur des motifs prévus par la *Charte*, recours qui permet de profiter des mécanismes internes de pondération que comporte l'article premier. Ainsi, les législateurs seraient en grande partie dépouillés du pouvoir que leur reconnaît la Constitution d'apporter, par voie législative, des restrictions raisonnables aux droits et libertés garantis par la *Charte*, lesquels possèderaient dès lors un caractère quasi absolu. En fait, le législateur qui ne voudrait pas se retrouver dans une telle situation devrait, d'une manière ou d'une autre, justifier expressément dans le texte législatif la limitation du droit garanti par la *Charte*, sans bénéficier des

such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, 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.

avantages d'un débat devant les tribunaux relativement aux restrictions qui sont acceptables dans une société libre et démocratique. Avant longtemps, les tribunaux seraient appelés à interpréter ce genre de texte de loi à la lumière des principes consacrés par la *Charte*. Le caractère manifestement impraticable d'une telle façon de faire met en évidence l'importance de maintenir le dialogue entre les pouvoirs composant l'État. Par conséquent, lorsqu'une loi n'est pas ambiguë, les tribunaux doivent donner effet à l'intention clairement exprimée par le législateur et éviter d'utiliser la *Charte* pour arriver à un résultat différent.

67 It may well be that, when this matter returns to trial, the respondents' counsel will make an application to have s. 9(1)(*c*) of the *Radiocommunication Act* declared unconstitutional for violating the *Charter*. At that time, it will be necessary to consider evidence regarding whose expressive rights are engaged, whether these rights are violated by s. 9(1)(*c*), and, if they are, whether they are justified under s. 1.

67 Il est fort possible, lorsque l'affaire retournera à procès, que l'avocat des intimés demande que l'al. 9(1)*c*) de la *Loi sur la radiocommunication* soit déclaré inconstitutionnel au motif qu'il porte atteinte à la *Charte*. À ce moment, il sera nécessaire d'examiner la preuve relative à l'identité des titulaires des droits à la liberté d'expression en cause, et de se demander si l'al. 9(1)*c*) porte atteinte à ces droits et, dans l'affirmative, si l'atteinte est justifiée au regard de l'article premier.

VII. Disposition

VII. Dispositif

68 In the result, I would allow the appeal with costs throughout, set aside the judgment of the Court of Appeal for British Columbia, and declare that s. 9(1)(*c*) of the *Radiocommunication Act* creates a prohibition against all decoding of encrypted programming signals, followed by an exception where authorization is received from the person holding the lawful right in Canada to transmit and authorize decoding of the signal. No answer is given to the constitutional questions stated by order of the Chief Justice.

68 Par conséquent, je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours, d'annuler le jugement de la Cour d'appel de la Colombie-Britannique et de déclarer que l'al. 9(1)*c*) de la *Loi sur la radiocommunication* a pour effet de créer une interdiction prohibant tout décodage de signaux d'abonnement, sous réserve d'une exception, savoir le cas où l'intéressé a obtenu la permission de le faire de la personne légitimement autorisée au Canada à transmettre le signal concerné et à en permettre le décodage. Aucune réponse n'est donnée à l'égard des questions constitutionnelles formulées sur ordonnance du Juge en chef.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellant: Crawford, McKenzie, McLean & Wilford, Orillia and Lang Michener, Ottawa.

Procureurs de l'appelante : Crawford, McKenzie, McLean & Wilford, Orillia et Lang Michener, Ottawa.

Solicitors for all the respondents, except Michelle Lee: Gold & Fuerst, Toronto.

Procureurs de tous les intimés, à l'exception de Michelle Lee : Gold & Fuerst, Toronto.

Solicitor for the intervener the Attorney General of Canada: The Department of Justice, Ottawa.

Solicitors for the intervener the Canadian Motion Picture Distributors Association: Sim, Hughes, Ashton & McKay, Toronto.

Solicitors for the intervener DIRECTV, Inc.: Borden Ladner Gervais, Toronto.

Solicitor for the intervener the Canadian Alliance for Freedom of Information and Ideas: Ian W. M. Angus, Port Hope.

Solicitors for the intervener the Congres Iberoamerican du Canada: Soloway, Wright, Ottawa.

Procureur de l'intervenant le procureur général du Canada : Le ministère de la Justice, Ottawa.

Procureurs de l'intervenante l'Association canadienne des distributeurs de films : Sim, Hughes, Ashton & McKay, Toronto.

Procureurs de l'intervenante DIRECTV, Inc. : Borden Ladner Gervais, Toronto.

Procureur de l'intervenante la Canadian Alliance for Freedom of Information and Ideas : Ian W. M. Angus, Port Hope.

Procureurs de l'intervenant le Congres Iberoamericain du Canada : Soloway, Wright, Ottawa.

R v. Skakun, 2014 BCCA 223

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Skakun,*
2014 BCCA 223

Date: 20140611
Docket: CA040157

Between:

Regina

Respondent

And

Brian Skakun

Appellant

Before: The Honourable Madam Justice D. Smith
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated July 24, 2012 (*R. v. Skakun*, 2012 BCSC 1103, Prince George Registry No. 30095).

Counsel for the Appellant: J.M. Duncan

Counsel for the Respondent: L.A. Ruzicka

Place and Date of Hearing: Prince George, British Columbia
April 24, 2014

Place and Date of Judgment: Vancouver, British Columbia
June 11, 2014

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Harris

2014 BCCA 223 (CanLII)

Summary:

Mr. Skakun, a municipal councillor in the City of Prince George, was convicted under s. 30.4 of the FOIPPA of making an unauthorized disclosure to the CBC of personal information that included a copy of a confidential workplace harassment report he had received during a closed restricted city council meeting. He was granted leave to appeal from the dismissal of his summary conviction appeal on the legal issue of whether a municipal councillor is an "officer" of a public body under s. 30.4.

Held: Appeal dismissed. The trial judge and summary conviction appeal judge correctly interpreted the term "officer" in s. 30.4 as including elected municipal councillors. Properly construed, the ordinary and grammatical meaning of "officer" in s. 30.4, based on its dictionary definition (both legal and non-legal), when read in the context of the broadly-stated purposes of the legislation (to provide access to information and privacy of personal information in the custody or control of public bodies) and the wide scope of its targeted public bodies and organizations, evinces a legislative intention to include elected municipal councillors within the ambit of the provision.

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Reasons for Judgment of the Honourable Madam Justice D. Smith:

Overview

[1] In an open and democratic society, protection of personal information in the control of public bodies is an essential counterbalance to the right of access to information from public bodies. Legislation that ensures these dual objectives has long been recognized as "quasi-constitutional", and is generally interpreted in a manner that advances its broad underlying policy objectives: *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403 at paras. 64-69, La Forest J., dissenting, but not on this point; *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53, [2002] 2 S.C.R. 773 at paras. 24-25; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401,* 2013 SCC 62, [2013] 3 S.C.R. 733 at paras. 19, 22. In this province, those objectives are encompassed in the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FOIPPA*].

[2] The central issue in this appeal is whether an elected municipal councillor is captured by the definition of "officer" in s. 30.4 of *FOIPPA.* Section 30.4 provides:

> An employee, officer or director of a public body or an employee or associate of a service provider who has access, whether authorized or unauthorized, to personal information in the custody or control of a public body, must not disclose that information except as authorized under this act.

[3] The circumstances in which this issue arose may be summarized briefly. On May 24, 2011, Mr. Skakun, a municipal councillor with the City of Prince George, was convicted by a Provincial Court judge for breaching s. 30.4 after admitting that he had delivered to the Canadian Broadcasting Corporation a copy of a confidential workplace harassment report which he had received during a closed restricted city council meeting. The trial judge found that the disclosure of the report occurred on August 18, 2008. His appeal from conviction was dismissed by the summary conviction appeal judge. Mr. Skakun then sought leave to appeal to this Court on two issues. He was granted leave to appeal on the single issue of "whether the summary conviction appeal judge erred in law in confirming the trial judge's

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conclusion that a municipal councillor is an 'officer … of a public body' under s. 30.4 of the *Freedom of Information and Protection of Privacy Act*." See *R. v. Skakun,* 2013 BCCA 94 at para. 19.

[4] Mr. Skakun submits that the plain and ordinary meaning of the term "officer" in s. 30.4 is not evident when read in its immediate context and that the dictionary meaning of "officer" does not shed light on the legislators' intended meaning. Therefore, he submits, the term is ambiguous and resort must be made to interpretive aids. In this case, those include the technical meaning of the term to its specialized municipal audience. He points to other internal provisions of *FOIPPA* that refer separately to the term "officer" and "elected official"; these terms are also used separately from references to municipal councillors in the *Local Government Act,* R.S.B.C. 1996, c. 323 [*LGA*], and the *Community Charter,* S.B.C. 2003, c. 26. He contends that if the Legislature had intended to include municipal councillors in s. 30.4, it would have done so explicitly. He also relies on a number of secondary principles and presumptions of statutory interpretation to support his position that the term "officer" in s. 30.4 does not include an elected municipal councillor. He maintains that such an interpretation would not give elected municipal councillors freedom to disclose unauthorized personal information to the public with impunity, as they continue to be subject to s. 117 of the *Community Charter,* which also prohibits such disclosure:

> 117(1) A council member or former council member must, unless specifically authorized otherwise by council,
>
> (a) keep in confidence any record held in confidence by the municipality, until the record is released to the public as lawfully authorized or required, and
>
> (b) keep in confidence information considered in any part of a council meeting or council committee meeting that was lawfully closed to the public, until the council or committee discusses the information at a meeting that is open to the public or releases the information to the public.

[5] The respondent Crown submits that the quasi-constitutional status of *FOIPPA* mandates a "broad, liberal, and purposive interpretation" of s. 30.4 (citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC

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53, [2011] 3 S.C.R. 471 at para. 62) in order to advance fundamental Canadian values of access to information and the protection of privacy of personal information in the control of public bodies. The Crown contends that while the term "officer" is not defined in *FOIPPA,* its omission from the list of public bodies exempted from the legislation (judges and members of the legislative assembly) and its dictionary meaning, which includes "[i]n public affairs … a person holding public office under … local government" (*Black's Law Dictionary,* 9th ed.) and "a holder of a public …office; … an appointed or elected functionary" (*Canadian Oxford Dictionary,* 2nd ed.), informs an interpretation that includes both appointed and elected officials, including municipal councillors. The Crown maintains that an application of the broad and purposive approach, and "[t]he first and cardinal principle of statutory interpretation … that one must look to the plain words of the provision" (*R. v. D.A.I.,* 2012 SCC 5, [2012] 1 S.C.R. 149 at para. 26), leads inexorably to an interpretation of "officer" in s. 30.4 that includes elected municipal councillors.

[6] For the reasons that I shall explain below, in my opinion the term "officer" in s. 30.4 of *FOIPPA* is not ambiguous. Based on the plain and ordinary meaning of the term, when read in the context of the broadly-stated purposes and wide range of targets in the legislation, I am of the view that "officer" in s. 30.4 includes an elected municipal councillor.

The legislative scheme

[7] The relevant provisions of *FOIPPA* are those that were in place in 2008 when the unauthorized disclosure of confidential information occurred in this case. While there have been some minor changes to the legislation since then, it is common ground that at the time of the offence *FOIPPA* applied to records in the custody or control of officials within a public body, which included by definition a municipality.

[8] Section 2(1) of *FOIPPA* sets out the purposes of the legislation: (i) to make public bodies more accountable to the public by providing the public with access to their records; and (ii) to protect personal privacy by preventing the unauthorized collection, use or disclosure of personal information by public bodies that would

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unreasonably invade the privacy of individual members of the public. See *Legal Services Society v. British Columbia (Information and Privacy Commissioner),* 2003 BCCA 278 at para. 1, 14 B.C.L.R. (4th) 67.

[9] The Supreme Court of Canada has endorsed these objectives in different contexts. Under the federal regime encompassed by the *Access to Information Act,* R.S.C. 1985, c. A-1, and the *Privacy Act,* R.S.C. 1985, c. P-21, the Court observed that while an open and democratic society requires access to information in the hands of public bodies, it must also offer protection for some of that information "in order to prevent the impairment of those very principles and promote good governance": *Canada (Information Commissioner) v. Canada (Minister of National Defence),* 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 15 [*National Defence*]. In *Lavigne,* the Court observed that the federal *Privacy Act* "is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society" (para. 25). In the context of Alberta's *Personal Information Protection Act,* S.A. 2003, c. P-6.5, the Court underscored the importance of privacy in a "vibrant democracy" and raised the status of legislation that aims to provide individuals with a measure of control over their personal information to the level of "quasi-constitutional": *Alberta (Information and Privacy Commissioner)* at paras. 19, 22.

[10] *FOIPPA* is structurally complex. It has six distinct parts, each of which deals with a different subject matter: Part 1 – Introductory Provisions; Part 2 – Freedom of Information; Part 3 – Protection of Privacy; Part 4 – Office and Powers of Information and Privacy Commissioner; Part 5 – Reviews and Complaints; and Part 6 – General Provisions. Section 30.4 falls within Part 3 of the Act. The legislation also includes three schedules: Schedule 1 – Definitions; Schedule 2 – Public Bodies; and Schedule 3 – Governing Bodies of Professions or Occupations. Schedules 2 and 3 list respectively, a wide range of public bodies and governing bodies of professions or occupations that are subject to the legislation. Schedule 1 defines a "public body" as including "a local public body" but excludes "the office of a person who is a member or officer of the Legislative Assembly" or "the Court of Appeal, Supreme

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Court or Provincial Court". A "local public body" is defined as including "a local government body"; a local government body is defined as including a "municipality". The scope of s. 30.4's application is increased by s. 3(3)(e), which makes s. 30.4 applicable to "officers of the Legislature [and] their employees … as if the officers and their offices were public bodies".

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[11] There is no definition for the term "officer". This omission provides the foundation for the appellant's argument that the term is ambiguous. From that conclusion, the appellant argues for a narrow interpretation of s. 30.4 that restricts the term to appointed officials only.

The first and cardinal principle of statutory interpretation

[12] The preferred "modern approach" to statutory interpretation endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 S.C.R. 27 at para. 21, adopts the classic statement from Elmer Driedger's *Construction of Statutes* (2d ed. 1983) at page 87:

> 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.

[13] This approach, the Court recognized, is not "founded on the wording of the legislation alone" (para. 21) but requires consideration of "the plain meaning of the specific provisions in question" in the context of "the scheme of the [legislation], its object or the intention of the legislature" (para. 23). The Court also relied on the statutory principle codified in what is now s. 8 of the *Interpretation Act,* R.S.B.C. 1996, c. 238:

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

[14] In *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, [2002] 2 S.C.R. 559, the Court further observed:

> [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 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".

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[15] Other presumptions and principles of statutory interpretation are engaged if a legislative provision is found to be ambiguous. This would include the strict construction of penal provisions for which the appellant advocates: *Bell ExpressVu* at para. 28. However, a provision is not ambiguous merely because individuals may differ on its interpretation. Genuine ambiguity exists only if a provision is reasonably capable of giving rise to two or more plausible meanings, "each equally in accordance with the intentions of the statute" (*CanadianOxy Chemicals Ltd. v. Canada (Attorney General),* [1999] 1 S.C.R. 743 at para. 14) and consistent with the entire legislative scheme.

[16] In *Bell ExpressVu,* the Court explained the meaning of "ambiguity" in this manner:

> [29] What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte,* [*Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108] *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 which I would add, "including other principles of interpretation".
>
> [30] … 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* [Professor John Willis], "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1), *supra,* at pp. 4-5).
>
> [Emphasis in original.]

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[17] Therefore, the "modern approach" to statutory interpretation seeks "to determine the intention of Parliament by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute" (*National Defence* at para. 27). Stated otherwise, it is to choose an interpretation "that best honours [the Legislature's] intention in enacting the … regime": *R. v. Fice,* 2005 SCC 32, [2005] 1 S.C.R. 742 at para. 39.

[18] The question then is: What is the ordinary and grammatical meaning of the term "officer" in s. 30.4, when read in its entire context and harmoniously with the *FOIPPA* legislative scheme, that best ensures the attainment of *FOIPPA's* objects and gives effect to the legislative intention of its drafters?

Discussion

[19] In the absence of a statutory definition, the starting point of the interpretative analysis is typically the dictionary definition of the statutory term. See *R. v. A.D.H.,* 2013 SCC 28, [2013] 2 S.C.R. 269 at paras. 43-46; *R. v. Steele*, 2007 SCC 36, [2007] 3 S.C.R. 3 at para. 31. As previously noted, the dictionary meanings of "officer" include both appointed and elected officials of public bodies. The true meaning of the term, however, can only be determined when its dictionary definition is considered in the context of the legislative scheme as a whole.

[20] The appellant relies on the differentiation between the term "officer" in s. 30.4 from other terms for an elected member of a public body in other parts of *FOIPPA,* to argue for an application of the statutory presumption that the same words should carry the same meaning throughout a statute. For this principle, he cites *R. v. Zeolkowski,* [1989] 1 S.C.R. 1378 at 1387, and the corollary principle from *Jabel*

Image Concepts Inc. et al. v. Minister of National Revenue (2000), 257 N.R. 193 (F.C.A.) at para. 12, that "[w]hen an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning". He reasons that the Legislature must therefore have intended to limit the meaning of "officer" in s. 30.4 to an unelected official. As an example in support of this submission, he refers to s. 73 in Part 6 – General Provisions. Section 73 deals with the protection of a public body from legal actions and provides that no action lies against a public body, the head of a public body, an elected official of a public body, or any person acting on behalf of or under the direction of the head of a public body.

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[21] The complexity of the *FOIPPA* legislative scheme is evident in its compartmentalization of a variety of different subject matters. While s. 73 (Part 6 – General Provisions) and s. 12(3)(b) (Part 2 – Access to Information) refer to "elected officials", s. 76(2)(c) (Part 6 – General Provisions) and s. 22(4)(e) (Part 2 – Access to Information) refer to "officers". Section 30.4, the offence provision in Part 3 for the protection of privacy, refers only to "officer" and includes no other reference to an elected member. The appellant would interpret this as legislative intent to exclude elected municipal councillors from the reach of s. 30.4. I am unable to agree.

[22] The significance of the different terminology in the protection of personal information provisions of *FOIPPA* requires an understanding of the interrelationship between Parts 2 and 3. Part 2 authorizes access to <u>all</u> types of information from public bodies where there has been a formal request by a citizen. A formal request for access to information triggers s. 22(1) in Part 2, which mandates certain exceptions. Those exceptions include instances where the disclosure of personal information "would be an unreasonable invasion of a third party's personal privacy." Part 3, in comparison, provides for the protection of privacy of only personal information that is in the control of public bodies. Section 22 is only applicable to information requests under Part 2. Within Part 3, s. 22 is only applicable where a provision in Part 3 specifically refers to s. 22 or Part 2. See *Canadian Office and Professional Employees' Union, Local 378 v. Coast Mountain Bus Company Ltd.*,

2005 BCCA 604 at paras. 48-49 [*Coast Mountain*]. The duality of *FOIPPA's* objectives and the paramount importance of the privacy provisions of *FOIPPA* were expressly noted by Chief Justice Finch in *Coast Mountain* at para. 17:

> Both Part 2 and Part 3 of the *Act* recognize the specific concerns associated with "personal information" and the fact that when dealing with such information, "privacy is paramount over access": see *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403 at para. 48.

[23] Another notable feature of *FOIPPA* is its use of inclusive definitions. As previously stated (in para. 10 above) a "public body" includes a "local public body", which in turn includes a "local government body", which includes a "municipality". The appellant has not directed the Court to any provisions in *FOIPPA* that suggest an "elected official" may not also be an "officer". In my review of the legislation there are no apparent provisions that would suggest an "elected official" may not include an "officer" or that such an interpretation would create an inconsistency in the application of the statute. To the contrary, absent a conflict or inconsistency that would be created by such a narrow interpretation of s. 30.4, and in view of the "paramount" objective of protecting privacy under the legislation, I am unable to discern why an "elected official" and an "officer" would be mutually exclusive terms.

[24] A narrow interpretation of s. 30.4 that would limit its application to appointed officials only would be inconsistent with the Legislature's enactment of s. 3(3). Section 3(3) further broadens the scope of the application of s. 30.4 to include officers and offices that are not treated as "public bodies" for the purposes of the rest of the *Act*. An interpretation that would exclude elected municipal councillors from the reach of s. 30.4 leads to a gap in the application of the legislation and in my view to a perverse result that is inconsistent with the underlying objectives of the legislation. It also creates the potential for piecemeal enforcement of its objectives when applied to other public bodies that may not have alternative enforcement legislation to bridge the gap.

[25] The appellant relies on *National Defence* to support his submission that the access to information and protection of privacy provisions of *FOIPPA* must be

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interpreted seamlessly together (at para. 74), all in the same manner. In *National Defence,* the Supreme Court rejected a function-based approach to the application of the *Access to Information Act* and the *Privacy Act* to federal Ministers. At issue was: (i) the right to access "any record under the control of a government institution" provided for in s. 4(1) of the *Access to Information Act*; and (ii) the exception in s. 3(j) of the *Privacy Act*, which enabled disclosure of personal information regarding "an individual who is or was an officer or employee of a government institution" where the information "relates to the position or functions of the individual" [emphasis added].

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[26] The factual underpinnings of the case were unique and unusual. The issue of the interpretation of certain provisions of the federal *Access to Information Act* arose in the context of a request for information from the Prime Minister's Office (the "PMO"), the Minister of National Defence, the Minister of Transport, the RCMP and the Privy Council Office (the "PCO"). The first issue was whether a Minister was a government institution under s. 4(1). The Court concluded that the PMO, Minister of National Defence, and Minister of Transport were not "government institutions". Parliament had chosen to define "government institution", as it applied to departments and ministries, in the form of a list, which did not include the Prime Minister or the Ministers of National Defence or Transport. It also rejected an interpretation of the relevant provisions of the *Access to Information Act* that would have created a dividing line between a Minister's political and non-political functions in order to determine whether the request was for information under the control of a government institution (paras. 37-42).

[27] Also at issue was whether the information requested of the PCO (the Prime Minister's agenda) was "personal information" protected from disclosure by s. 19(1) of the *Access to Information Act*. The Court concluded that while the PCO was a government institution, it would be contrary to Parliament's intention to interpret s. 3(j) of the *Privacy Act* in a manner that rendered the Prime Minister part of a government institution for the purposes of the *Privacy Act* but not the *Access to*

Information Act. Writing for the majority, Charron J. identified the need for both federal acts to be read together "as a seamless code", concluding:

> [74] Finally, as this Court explained in *Dagg v. Canada (Minster of Finance),* [1997] 2 S.C.R. 403 (*per* La Forest J. in dissent but not on this point), and reiterated in [*Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66]*,* the *Access to Information Act* and the *Privacy Act* [R.S.C. 1985, c. P-21] are to be read together as a seamless code. The interpretation of Kelen J. and the Commissioner would create discordance between the two statutes. Under the *Access to Information Act,* a Minister or Prime Minister would not be part of a government institution, while under the *Privacy Act,* he would be considered an "officer" of the government institution. I agree with the Federal Court of Appeal. Had Parliament intended the Prime Minster to be treated as an "officer" of the PCO pursuant to the *Privacy Act,* it would have said so expressly. Applying s. 3(j) of the *Privacy Act* to the relevant portions of the Prime Minister's agenda under the control of the RCMP and the PCO, I conclude that they fall outside the scope of the access to information regime.

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[28] Charron J. also cautioned against a court relying on the "quasi-constitutional" nature of the legislation to interpret its provisions without resort to the general principles of statutory interpretation, emphasizing that a court should not rewrite the actual words of the legislation "with its own view of how the legislative purpose could be better promoted" (para. 40).

[29] The concern raised in *National Defence* regarding the potential for an inconsistent interpretation of the provisions of the *Access to Information Act* and those in the *Privacy Act* is clearly distinguishable from the circumstances of this case. I agree that the quasi-constitutional nature of the legislation does not obviate the need to apply the principles and presumptions of statutory interpretation in order to determine the true meaning of s. 30.4. However, unlike the *Privacy Act* and *Access to Information Act*, *FOIPPA* is a single piece of legislation that incorporates the dual objectives of access to information and protection of privacy to personal information. It defines the persons and institutions to which the statute applies using broad language, with specific exclusions as necessary (such as the exclusion of MLA's and members of the judiciary from the definition of "public body"). This legislative decision, when considered in conjunction with the importance of the underlying values recognized in *FOIPPA's* stated objectives, attracts a generous

interpretation that permits the achievement of the statute's broad public purposes. Common sense would also dictate such an approach. In my view, an interpretation of *FOIPPA* that renders disclosure of personal information in the control of a municipality permissible on the basis of who makes the disclosure would not be a "seamless" interpretation of the dual objectives laid out in *FOIPPA*.

[30] The importation of the meaning of "officer" from other statutes, in a different context, also does not assist in the interpretation of s. 30.4. In this regard, I echo the sentiments of Charron J. in *National Defence* (at para. 71) that the meaning of "officer" must be ascertained in its proper context and not by resorting to definitions in other statutes, in the absence of any indication that incorporation of those definitions was intended. *FOIPPA* is very different legislation from the *LGA* and *Community Charter.* Both the *LGA* and the *Community Charter* are sector-specific enabling statutes that cloak municipalities (in s. 3 of the *Community Charter*) and regional districts (in s. 1 of the *LGA*), with the legal authority to govern their communities. In contrast, *FOIPPA* is a complete code for the implementation of its dual objectives of access to information and protection of personal information in the control of public bodies. It is not sector specific but targets a wide range of public bodies and organizations. Therefore, to import the meaning of "officer" from narrowly-focussed municipal/district-related legislation into the broad regime of *FOIPPA* would, in my view, unduly restrict its application and result in an inconsistent and piecemeal approach that is contrary to the legislative intent. Again, this would create an absurdity where an elected municipal councillor would not be subject to *FOIPPA* even though the legislation clearly intended municipalities to be subject to its requirements.

[31] The appellant relies on s. 117 of the *Community Charter* to restrict the application of s. 30.4 of *FOIPPA* to appointed officials only, arguing that s. 117 of the *Community Charter,* in combination with s. 5 of the *Offence Act,* R.S.B.C. 1996, c. 338, covers the gap that such an interpretation would create. With respect, this submission merely begs the issue. As was observed in *R. v. Sheets,* [1971] S.C.R. 614 at 621, "[t]he fact that a person may, because of an act or omission, be subject

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to prosecution under two statutory provisions, is not *per se* a decisive criterion of interpretation of either one."

Disposition

[32] Properly construed, the ordinary and grammatical meaning of "officer" in s. 30.4 of *FOIPPA*, based on its dictionary definition (both legal and non-legal), when read in the context of the legislation's broad stated purposes and wide-ranging scope of application to public bodies and organizations, inexorably leads to the conclusion that the legislative intention was for "officer" in s. 30.4 to include both elected and appointed officials. In the result, I find no error in the decision of the summary conviction appeal judge to uphold the trial judge's interpretation of s. 30.4 of *FOIPPA* and I would dismiss the appeal.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Harris"

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R v. Ulybel Enterprises Ltd., [2001] 2 SCR 867, 2001 SCC 56

Her Majesty The Queen *Appellant*

v.

Ulybel Enterprises Limited *Respondent*

INDEXED AS: R. *v.* ULYBEL ENTERPRISES LTD.

Neutral citation: 2001 SCC 56.

File No.: 27543.

2001: January 16; 2001: September 27.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND

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 precondition 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

Sa Majesté la Reine *Appelante*

c.

Ulybel Enterprises Limited *Intimée*

RÉPERTORIÉ : R. *c.* ULYBEL ENTERPRISES LTD.

Référence neutre : 2001 CSC 56.

Nº du greffe : 27543.

2001 : 16 janvier; 2001 : 27 septembre.

Présents : Les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE

Tribunaux — Compétence — Cours supérieures — La Cour fédérale du Canada a ordonné la vente d'un navire et a détenu le produit de la vente dans l'exercice de sa compétence en matière d'amirauté — La cour supérieure d'une province peut-elle ordonner la confiscation du produit de la vente d'un navire en vertu de l'art. 72(1) de la Loi sur les pêches, L.R.C. 1985, ch. F-14?

Pêche — Confiscation du produit de la vente d'un bateau de pêche — Étendue du pouvoir d'ordonner la confiscation du produit de la vente — La rétention continue d'un bateau saisi constitue-t-elle une condition préalable au prononcé d'une ordonnance de confiscation en vertu de l'art. 72(1) de la Loi sur les pêches, L.R.C. 1985, ch. F-14?

L'intimée est le propriétaire inscrit d'un navire canadien à bord duquel des personnes ont été vues en train de pêcher dans la zone régie par la convention de l'OPANO en l'absence du permis et du certificat d'enregistrement requis par le *Règlement de pêche de l'Atlantique de 1985*. Le navire et sa cargaison de poisson ont été saisis et la Couronne a pris matériellement possession du navire. En 1994 et 1995, des actions dans lesquelles on prétendait avoir un droit dans le navire ont été intentées devant la Cour fédérale du Canada, qui a délivré des ordonnances de saisie à l'égard du navire. L'intimée a ensuite été mise en accusation relativement à des chefs d'accusation qui devaient être instruits par la Section de première instance de la Cour suprême de Terre-Neuve. Entre-temps, la Couronne a conservé la possession du navire et a engagé des frais pour sa garde et son entretien. En 1996, elle est intervenue dans l'une des actions intentées devant la Cour fédérale et a réussi

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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.

à obtenir une ordonnance autorisant la vente du navire. Le produit de la vente a été déposé auprès du receveur général au profit de la Cour fédérale. En 1997, l'intimée a été déclarée coupable relativement aux accusations portées contre elle et on lui a infligé une peine incluant la confiscation d'une somme de 50 000 $ sur le produit de la vente du navire. La Cour d'appel de Terre-Neuve a confirmé la déclaration de culpabilité et a jugé que la peine n'était pas excessive. Elle a cependant conclu que la Section de première instance de la Cour suprême n'avait ni la compétence ni le pouvoir d'ordonner la confiscation du produit de la vente et elle a infirmé l'ordonnance de confiscation, estimant que la rétention matérielle d'un objet saisi en vertu de la *Loi sur les pêches* est une condition préalable nécessaire au prononcé d'une ordonnance de confiscation.

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

Arrêt : Le pourvoi est accueilli et l'ordonnance de confiscation rendue par la Section de première instance de la Cour suprême de Terre-Neuve est rétablie.

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.

La cour supérieure d'une province peut ordonner la confiscation du produit de la vente d'un navire en vertu du par. 72(1) de la *Loi sur les pêches*, même lorsque c'est la Cour fédérale qui a ordonné la vente du navire et qu'elle détient le produit de la vente dans l'exercice de sa compétence en matière d'amirauté.

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.

Si on interprète les termes utilisés au par. 72(1) de la *Loi sur les pêches* dans leur sens ordinaire et grammatical, en tenant compte du type de biens susceptibles de saisie aux termes de l'art. 51, il est clair que la portée du par. 72(1) s'étend au prononcé d'une ordonnance de confiscation du produit de l'aliénation d'un navire saisi en vertu de la Loi. L'historique législatif appuie aussi une interprétation plus large du par. 72(1). Une ancienne version du par. 72(1) limitait l'étendue du pouvoir d'ordonner la confiscation au produit de la vente de marchandises périssables. En 1991, les termes limitatifs ont été supprimés pour être remplacés par la mention générale du produit de « tout objet saisi ». Il existe une présomption selon laquelle les modifications poursuivent un but intelligible et, en l'espèce, la modification apportée en 1991 au par. 72(1) a eu pour effet d'élargir la portée de la disposition relative à la confiscation en y intégrant le pouvoir de confisquer le produit de la vente d'un navire. Cet effet est conforme à l'intention du législateur, qui consiste à accroître la souplesse et la sévérité des peines applicables aux infractions prévues dans la *Loi sur les pêches*.

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

Le fait que la *Loi sur les pêches* préserve les biens de l'accusé n'empêche pas l'interprétation large du pouvoir d'ordonner la confiscation. Cela reflète la présomption

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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,

d'innocence et le principe selon lequel il faut préserver les biens de l'accusé jusqu'à ce qu'une déclaration de culpabilité soit prononcée. La personne accusée d'une infraction à la *Loi sur les pêches* ne peut toutefois pas invoquer la présomption d'innocence pour empêcher une personne ayant une demande *in rem* à faire valoir relativement à ses biens d'obtenir réparation ou pour retarder l'obtention de cette réparation. De même, une décision définitive qui établit la culpabilité met fin à la présomption d'innocence et rien dans la Loi n'empêche la confiscation du produit d'une vente effectuée en matière civile. Le régime établi par la Loi est suffisamment strict pour préserver les biens saisis de l'accusé et suffisamment souple pour préserver le pouvoir d'imposer les peines nécessaires à la réalisation de l'objet de la Loi.

Quant au contexte législatif, si le législateur avait voulu que les expressions « le produit de leur aliénation » et « le produit de son aliénation » se limitent au produit de la vente de marchandises périssables, il aurait pu le dire explicitement, comme il l'a fait au par. 70(3) ainsi qu'aux par. 72(2) et 72(3). En outre, il ne ressort pas expressément du par. 72(1) que la rétention matérielle continue constitue une condition préalable au prononcé d'une ordonnance de confiscation et il n'a pas lieu de conclure qu'il s'agit d'une condition préalable. Le processus par lequel le dépôt d'une garantie permet la mainlevée de la saisie des biens en vertu du par. 71(2) profite aux parties et aux créanciers, et il ne faut pas décourager le recours à celui-ci. Ce processus serait moins intéressant si une ordonnance de confiscation était assujettie à une condition préalable de rétention matérielle continue. Le paragraphe 72(1) doit donc être interprété comme prévoyant le prononcé d'une ordonnance de confiscation contre un navire ayant fait l'objet d'une mainlevée de saisie et restitué sur dépôt d'une garantie. Il s'ensuit que le par. 72(1) autorise la confiscation d'objets qui ont été saisis antérieurement, mais qui ont fait l'objet d'une mainlevée. De plus, il ressort clairement de l'art. 75 que la Loi prévoit la possibilité d'instances parallèles, *in personam* et *in rem*, touchant le même navire. Cette conclusion renforce l'opinion que le par. 72(1) autorise la confiscation du produit de la vente obtenu en vertu d'un autre texte législatif que la *Loi sur les pêches*. Enfin, on doit interpréter les dispositions en matière d'amirauté de la *Loi sur la Cour fédérale* et de la *Loi sur les pêches* comme des régimes cohérents et harmonieux de réglementation des questions maritimes. Les bateaux de pêche et leur utilisation sont au cœur des activités que régit chacun de ces systèmes. Si on adoptait l'interprétation restrictive de la Cour d'appel, une ordonnance de vente de la Cour fédé-

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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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Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Buttersworths, 1983.
Driedger on the Construction of Statutes, 3rd ed. by Ruth Sullivan. Toronto: Butterworths, 1994.

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.

rale mettrait fin au pouvoir de la Cour suprême de Terre-Neuve d'ordonner la confiscation. Un tel résultat n'est pas conforme au principe d'interprétation qui présume l'harmonie, la cohérence et l'uniformité entre les lois traitant du même sujet.

Jurisprudence

Arrêts mentionnés : *R. c. Savory* (1992), 108 N.S.R. (2d) 245; *R. c. Corcoran* (1997), 153 Nfld. & P.E.I.R. 318; *R. c. Vautour* (2000), 226 R.N-B. (2e) 226; *R. c. Chute* (1997), 160 N.S.R. (2d) 378; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Gravel c. Cité de St-Léonard*, [1978] 1 R.C.S. 660; *Amos c. Insurance Corp. of British Columbia*, [1995] 3 R.C.S. 405; *Bathurst Paper Ltd. c. Ministre des Affaires municipales du Nouveau-Brunswick*, [1972] R.C.S. 471.

Lois et règlements cités

Code criminel, L.R.C. 1985, ch. C-46, art. 489.1.
Loi sur la Cour fédérale, L.R.C. 1985, ch. F-7.
Loi sur les pêches, L.R.C. 1985, ch. F-14 [mod. 1991, ch. 1], art. 50, 51, 70, 71, 71.1, 72, 73.1, 75.
Règlement de pêche de l'Atlantique de 1985, DORS/86-21, art. 13(1)*a*), *b*).
Règles de la Cour fédérale, C.R.C. 1978, ch. 663, règles 1007, 1008, 1010.

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POURVOI contre un arrêt de la Cour d'appel de Terre-Neuve (1999), 178 Nfld. & P.E.I.R. 321, 544 A.P.R. 321, [1999] N.J. No. 232 (QL), qui a annulé une ordonnance de confiscation rendue par la Cour suprême, Section de première instance (1997), 150 Nfld. & P.E.I.R. 308, 470 A.P.R. 308, [1997] N.J. No. 114 (QL). Pourvoi accueilli.

Graham Garton, c.r., et *Gordon S. Campbell*, pour l'appelante.

John R. Sinnott, c.r., pour l'intimée.

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The judgment of the Court was delivered by

IACOBUCCI J. — 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

A. *The Vessel and its Seizure*

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.

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

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Le présent pourvoi soulève la question de savoir si la cour supérieure d'une province peut ordonner la confiscation du produit de la vente d'un navire en vertu du par. 72(1) de la *Loi sur les pêches*, L.R.C. 1985, ch. F-14, modifiée par L.C. 1991, ch. 1, même lorsque c'est la Cour fédérale du Canada qui a ordonné la vente du navire et qu'elle détient le produit de la vente dans l'exercice de sa compétence en matière d'amirauté. 1

I. Les faits

A. *Le navire et sa saisie*

Le « Kristina Logos » (le « navire ») est un chalutier-usine congélateur construit en 1976 et immatriculé au Canada en 1981. Le 3 février 1992, José Pratas a acheté le navire par acte de vente de Pêches Nordiques Inc., auparavant connue sous le nom de Kosmos P/F Fishery Canada Ltd. Le même jour, M. Pratas a inscrit trois documents au Registre des navires immatriculés au Canada : l'acte de vente par lequel la propriété du navire lui a été cédée, l'hypothèque qu'il a consentie à Pêches Nordiques Inc. (cédée plus tard à Hillsdown International Ltd. et finalement à Clearwater Atlantic Seafoods Inc.) et une déclaration de propriété énonçant qu'il avait le droit d'être inscrit comme propriétaire. 2

Le 16 octobre 1992, M. Pratas a vendu le navire à Ulybel Enterprises Limited (l'« intimée »). M. Pratas était le seul administrateur et actionnaire de l'intimée, qui a été constituée en personne morale le 22 novembre 1989 en Nouvelle-Écosse. L'acte de vente cédant la propriété du navire à l'intimée et une déclaration de propriété indiquant que l'intimée réunissait les conditions voulues pour être propriétaire d'un navire canadien ont été déposés le 9 décembre 1992 au Registre des navires immatriculés au Canada. Le même jour, le bureau du Registre a appris que M. Pratas avait été nommé gestionnaire. En conséquence, pendant 3

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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 use of the vessel for fishing without a licence and two counts of permitting the use of the vessel for fishing without a registration card

toute la période pertinente, le navire était un navire canadien grevé d'une hypothèque enregistrée, dont l'intimée était le propriétaire inscrit.

En 1993, l'intimée a conclu un contrat d'affrètement à coque nue avec une société portugaise du nom de Marqueirapesca Lda. Les actionnaires de cette société sont M. Pratas, qui détient 51 pour 100 de ses actions en circulation, et Carlos et Mario Neves (les « frères Neves »), qui en détiennent 49 pour 100. Il n'a pas été contesté qu'en 1993 et 1994, Marqueirapesca Lda. a utilisé le navire pour pêcher au large de la côte de Terre-Neuve et dans les divisions 3M, 3N et 3O de la zone régie par la convention de l'OPANO.

L'OPANO est un organisme international qui a pour but d'optimiser l'utilisation, la gestion et la conservation des stocks de poisson de l'Atlantique nord-ouest dans un quadrant des eaux côtières et océaniques dont la frontière nord s'étend du détroit d'Hudson, au sud de l'île de Baffin, jusqu'au Groenland, et dont la frontière ouest s'étend de l'île de Baffin jusqu'au nord de la Caroline du Nord. Les divisions 3M, 3N et 3O se situent au sud et à l'ouest de Terre-Neuve. Deux de ces divisions comprennent des parties importantes des Grands Bancs de Terre-Neuve.

Le 2 avril 1994, on a vu des personnes à bord du navire pêcher dans la zone régie par la convention de l'OPANO en l'absence du permis et du certificat d'enregistrement requis par les al. 13(1)*a*) et *b*) du *Règlement de pêche de l'Atlantique de 1985*, DORS/86-21 (le « Règlement »). Des fonctionnaires du ministère des Pêches et des Océans ont saisi le navire et sa cargaison de poisson en application de l'art. 51 de la *Loi sur les pêches* et ont escorté le navire à St. John's (Terre-Neuve). C'est ainsi que la Couronne du chef du Canada a pris matériellement possession du navire.

B. *Le litige : un navire et deux tribunaux*

Les 4 et 5 avril 1994, deux dénonciations ont été faites sous serment, comportant quatre chefs d'accusation contre l'intimée, dont deux étaient liés au fait d'avoir permis l'utilisation du navire pour la pêche en l'absence de certificat d'enregistrement et

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contrary to ss. 13(1)(*a*) and 13(1)(*b*) of the Regulations.

On April 5, 1994, three days after the vessel was seized under the *Fisheries Act*, an action was commenced in the Federal Court of Canada by the mortgagee of the vessel, Clearwater Atlantic Seafoods Inc., seeking $125,000, alleged to be the balance of purchase monies owing from the sales of the vessel to Mr. Pratas and the respondent. On the same day, the Federal Court of Canada issued an arrest order against the vessel being held by the Crown. On May 23, 1995, a second action was brought in the Federal Court of Canada, this time by the Neves Brothers claiming an ownership interest in the vessel valued at $512,750. A second arrest order was issued on that same day.

On September 28, 1995, the respondent was indicted on the same charges as those contained in the informations sworn on April 4 and 5, 1994. The trial was scheduled to commence in the Newfoundland Supreme Court, Trial Division on November 28, 1996.

Meanwhile, the Crown continued in possession of the vessel and began to incur costs for its storage and maintenance. On November 12, 1996, approximately 19 months after the vessel was first seized and arrested, the Crown applied to intervene in the action commenced by the Neves Brothers in the Federal Court of Canada as a person claiming an interest in the property pursuant to Rule 1010 of the *Federal Court Rules*, C.R.C. 1978, c. 663. The application to intervene was supported by the Crown's claim for costs and expenses for the care and preservation of the vessel amounting to over $500,000. That amount represented the costs incurred by the Crown in seizing the vessel under the *Fisheries Act*, and the on-going cost of maintaining the ship (approximately $60,000 per year). At the same time, the Crown brought a motion for the lifting of the arrest and an order for the sale of the vessel pursuant to Federal Court Rule 1007(3).

deux autres à celui d'avoir permis l'utilisation du navire pour la pêche en l'absence de permis, en contravention des al. 13(1)*a*) et 13(1)*b*) du Règlement.

8 Trois jours après la saisie du navire en vertu de la *Loi sur les pêches*, soit le 5 avril 1994, le créancier titulaire de l'hypothèque grevant le navire, Clearwater Atlantic Seafoods Inc., a intenté une action devant la Cour fédérale du Canada pour réclamer la somme de 125 000 $, qui correspondrait au solde du prix de la vente du navire à M. Pratas et à l'intimée. Le même jour, la Cour fédérale du Canada a délivré une ordonnance de saisie à l'égard du navire qui se trouvait en la possession de la Couronne. Le 23 mai 1995, une deuxième action a été intentée devant la Cour fédérale; dans celle-ci, les frères Neves revendiquaient un droit de propriété sur le navire, droit qu'ils évaluaient à 512 750 $. La Cour fédérale a délivré une deuxième ordonnance de saisie le jour même.

9 Le 28 septembre 1995, l'intimée a été mise en accusation relativement aux mêmes chefs d'accusations que ceux figurant dans les dénonciations faites sous serment les 4 et 5 avril 1994. Le début du procès devant la Section de première instance de la Cour suprême de Terre-Neuve a été fixé au 28 novembre 1996.

10 Entre-temps, la Couronne a conservé la possession du navire et a commencé à engager des frais pour sa garde et son entretien. Le 12 novembre 1996, environ 19 mois après la première saisie du navire, la Couronne a présenté une demande d'intervention dans l'action intentée par les frères Neves devant la Cour fédérale du Canada en tant que personne prétendant avoir un droit afférent aux biens en question conformément à la règle 1010 des *Règles de la Cour fédérale*, C.R.C. 1978, ch. 663. La demande d'intervention de la Couronne s'appuyait sur sa réclamation concernant les frais et les déboursés relatifs à l'entretien et à la conservation du navire qui s'élevaient à plus de 500 000 $. Ce montant représentait les frais que la Couronne avait engagés pour saisir le navire en vertu de la *Loi sur les pêches* ainsi que les frais généraux d'entretien de ce dernier (environ 60 000 $ par année). D'autre part, la Couronne a

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Rule 1007(3) provides that the court may, before judgment, order property under arrest to be sold if it is deteriorating in value.

présenté une requête en vue d'obtenir la mainlevée de la saisie et une ordonnance de vente du navire en vertu de la règle 1007(3) des *Règles de la Cour fédérale*. Cette disposition prévoit que la Cour peut, avant le jugement, ordonner que les biens saisis soient vendus s'ils perdent de leur valeur.

11 The respondent brought a motion in the Newfoundland Supreme Court, Trial Division for a declaration that the Crown was not entitled to proceed in another court to seek the sale of the vessel and an order for its release from seizure. That motion was denied on December 6, 1996.

L'intimée a présenté une requête devant la Section de première instance de la Cour suprême de Terre-Neuve en vue d'obtenir un jugement déclaratoire portant que la Couronne n'avait pas le droit de s'adresser à un autre tribunal pour solliciter la vente du navire et une ordonnance de mainlevée de la saisie de celui-ci. Cette requête a été rejetée le 6 décembre 1996.

12 On December 9, 1996, a prothonotary of the Federal Court found that the Crown had the necessary interest to intervene in the action since it had incurred expenses after the arrest of the vessel, characterized as expenses *in custodia legis*. The prothonotary found that this was an appropriate case for the Federal Court to grant an order of sale as costs and expenses would continue to mount until the ship was sold. Further, the ship's classification certificate would soon expire, which would significantly reduce the ship's value. Therefore, the prothonotary found that the case met the test found in Rule 1007(3) of the *Federal Court Rules*. Accordingly, on December 18, 1996, the Federal Court ordered the sale of the vessel ([1996] F.C.J. No. 1683 (QL); (1996), 124 F.T.R. 167).

Le 9 décembre 1996, un protonotaire de la Cour fédérale a conclu que la Couronne avait l'intérêt requis pour intervenir dans l'action étant donné qu'elle avait engagé des dépenses après la saisie du navire, dépenses qualifiées de dépenses *in custodia legis*. Le protonotaire a estimé qu'il convenait en l'espèce que la Cour fédérale délivre une ordonnance de vente puisque les frais et déboursés continueraient d'augmenter jusqu'à la vente. De plus, le certificat de classification du navire devait expirer sous peu, ce qui réduirait de façon importante la valeur de celui-ci. Le protonotaire a donc conclu que le critère figurant à la règle 1007(3) des *Règles de la Cour fédérale* était respecté. En conséquence, la Cour fédérale a ordonné la vente du navire le 18 décembre 1996 ([1996] A.C.F. nº 1683 (QL); (1996), 124 F.T.R. 167).

13 The respondent applied for a stay of the order for sale pending its appeal, but the order for sale was confirmed by the Federal Court, Trial Division ([1997] F.C.J. No. 200 (QL)). The vessel was sold on May 15, 1997 for $605,000 and, pursuant to the order of sale, the proceeds were deposited with the Receiver General in an interest bearing account for the benefit of the Federal Court. The respondent then appealed the order for sale to the Federal Court of Appeal, but since the vessel had already been sold that appeal was dismissed as being moot ((1998), 225 N.R. 32).

L'intimée a présenté une demande de sursis de l'ordonnance de vente jusqu'à ce qu'il soit statué sur son appel, mais la Section de première instance de la Cour fédérale a confirmé l'ordonnance ([1997] A.C.F. nº 200 (QL)). Le navire a été vendu le 15 mai 1997 pour la somme de 605 000 $ et, conformément à l'ordonnance de vente, le produit de la vente a été déposé auprès du receveur général dans un compte portant intérêt, au profit de la Cour fédérale. L'intimée a ensuite interjeté appel de l'ordonnance de vente auprès de la Cour d'appel fédérale, mais, comme le navire avait déjà été vendu, l'appel a été rejeté au motif qu'il était devenu théorique ([1998] A.C.F. nº 362 (QL)).

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On May 21, 1997, the respondent was convicted of the charges brought against it in the Supreme Court of Newfoundland, Trial Division ((1997), 150 Nfld. & P.E.I.R. 308). On July 2, 1997, the Newfoundland Supreme Court, Trial Division imposed a sentence on the respondent that included fines totalling $120,000, the forfeiture of the proceeds of sale of the cargo of fish ($58,989.34), and the forfeiture of $50,000 of the proceeds of the sale of the vessel.

14 Le 21 mai 1997, la Section de première instance de la Cour suprême de Terre-Neuve a déclaré l'intimée coupable relativement aux accusations portées contre elle ((1997), 150 Nfld. & P.E.I.R. 308). Le 2 juillet 1997, elle lui a infligé une peine incluant des amendes s'élevant à 120 000 $, la confiscation du produit de la vente de la cargaison de poisson (58 989,34 $) et la confiscation d'une somme de 50 000 $ sur le produit de la vente du navire.

The respondent appealed its conviction and sentence to the Newfoundland Court of Appeal. Before that appeal could be heard, on August 11, 1999, a prothonotary of the Federal Court of Canada determined the ranking of the claims of the parties in the actions before it, including the claims of the mortgagee, the Neves brothers, and the Crown for fines, forfeiture and costs. The ranking of claims was conditional on the outcome of the respondent's appeal of sentence ((1999), 173 F.T.R. 31).

15 L'intimée a interjeté appel de sa déclaration de culpabilité et de sa peine auprès de la Cour d'appel de Terre-Neuve. Avant l'audition de cet appel, un protonotaire de la Cour fédérale du Canada a déterminé, le 11 août 1999, le rang des réclamations des parties aux actions intentées devant cette Cour, notamment le rang des réclamations du créancier hypothécaire, des frères Neves et de la Couronne, la réclamation de celle-ci visant les amendes, la confiscation et les frais. Le rang des réclamations était conditionnel à l'issue de l'appel interjeté par l'intimée contre sa peine ([1999] A.C.F. nº 1295 (QL)).

Another appeal was brought by the defendants to the action in the Federal Court, including Ulybel and Pratas, against the Prothonotary's ranking of claims. That appeal was heard before McKay J. of the Federal Court, Trial Division and judgment has been reserved.

16 Les défendeurs à l'action en Cour fédérale, dont Ulybel et Pratas, ont eux aussi interjeté appel pour contester le rang des réclamations établi par le protonotaire. Le juge McKay de la Section de première instance de la Cour fédérale a entendu cet appel et a différé le prononcé de son jugement.

On August 17, 1999, the Newfoundland Court of Appeal upheld the respondent's conviction and found that the sentence imposed was not excessive ((1999), 178 Nfld. & P.E.I.R. 321). However, the Court of Appeal held that the *Fisheries Act* did not provide the Newfoundland Supreme Court, Trial Division with the jurisdiction or authority to order the forfeiture of any of the proceeds of sale of a vessel. The Court of Appeal held that physical detention of a thing seized under the *Fisheries Act* is a necessary precondition to an order of forfeiture. In this case, the Court of Appeal held that the vessel must have been released from seizure when sold under the authority of the Federal Court, thereby precluding a subsequent order of forfeiture under the *Fisheries Act*. Accordingly, the Court of

17 Le 17 août 1999, la Cour d'appel de Terre-Neuve a confirmé la déclaration de culpabilité de l'intimée et a jugé que la peine infligée n'était pas excessive ((1999), 178 Nfld. & P.E.I.R. 321). La Cour d'appel a cependant conclu que la *Loi sur les pêches* ne conférait pas à la Section de première instance de la Cour suprême de Terre-Neuve la compétence ou le pouvoir d'ordonner la confiscation du produit de la vente d'un navire. Selon la Cour d'appel, la rétention matérielle d'un objet saisi en vertu de la *Loi sur les pêches* est une condition préalable nécessaire au prononcé d'une ordonnance de confiscation. La Cour d'appel a statué que la vente ordonnée par la Cour fédérale avait nécessairement entraîné la mainlevée de la saisie du navire, ce qui empêchait le prononcé ulté-

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Appeal overturned the order of forfeiture made by the court below.

18 The respondent's application to this Court for leave to appeal its conviction and sentence was denied. The Crown's application to this Court for leave to appeal the decision of the Court of Appeal was granted.

19 It is important to keep in mind that none of the decisions of the Federal Court of Canada is on appeal before this Court. In fact, nothing in these reasons should be interpreted as commenting on those proceedings. The only decision on appeal is the Newfoundland Court of Appeal's reversal of the sentencing court's order of forfeiture against the proceeds of sale of the vessel.

II. Relevant Legislation

20 *Fisheries Act*, R.S.C. 1985, c. F-14, as amended by S.C. 1991, c. 1

50. Any fishery officer, fishery guardian or peace officer may arrest without warrant a person who that fishery officer, guardian or peace officer believes, on reasonable grounds, has committed an offence against this Act or any of the regulations, or whom he finds committing or preparing to commit an offence against this Act or any of the regulations.

70. (1) A fishery officer or fishery guardian who seizes any fish or other thing under this Act may retain custody of it or deliver it into the custody of any person the officer or guardian considers appropriate.

. . .

(3) A fishery officer or fishery guardian who has custody of any fish or other perishable thing seized under this Act may dispose of it in any manner the officer or guardian considers appropriate and any proceeds realized from its disposition shall be paid to the Receiver General.

71. (1) Subject to this section, any fish or other thing seized under this Act, or any proceeds realized from its disposition, may be detained until the fish or thing or

Notre Cour a rejeté la demande d'autorisation de pourvoi qu'a présentée l'intimée contre sa déclaration de culpabilité et sa peine. Elle a accueilli la demande d'autorisation de pourvoi de la Couronne contre la décision de la Cour d'appel.

Il est important de se rappeler que les décisions de la Cour fédérale du Canada ne font l'objet d'aucun pourvoi devant notre Cour. En fait, rien dans les présents motifs ne devrait être interprété comme constituant une observation sur ces instances. La seule décision dont notre Cour est saisie est celle par laquelle la Cour d'appel de Terre-Neuve a infirmé l'ordonnance de confiscation émanant du tribunal chargé de déterminer la peine.

II. Les dispositions législatives pertinentes

Loi sur les pêches, L.R.C. 1985, ch. F-14 (modifiée par L.C. 1991, ch. 1)

50. Les agents des pêches, gardes-pêche ou agents de la paix peuvent arrêter sans mandat toute personne dont ils ont des motifs raisonnables de croire qu'elle a commis une infraction à la présente loi ou à ses règlements ou qu'ils prennent en flagrant délit d'infraction ou se préparant à commettre une infraction à la présente loi ou à ses règlements.

70. (1) L'agent des pêches ou le garde-pêche qui saisit du poisson ou un objet en vertu de la présente loi peut s'en réserver la garde ou l'attribuer à toute personne qu'il estime compétente.

. . .

(3) L'agent des pêches ou le garde-pêche qui a la garde de marchandises périssables saisies peut en disposer de la façon qu'il estime indiquée, le produit de l'aliénation étant versé au receveur général.

71. (1) Sous réserve des autres dispositions du présent article, le poisson ou les objets saisis en vertu de la présente loi ou le produit de leur aliénation peuvent être

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proceeds are forfeited or proceedings relating to the fish or thing are finally concluded.

(2) Subject to subsection 72(4), a court may order any fish or other thing seized under this Act to be returned to the person from whom it was seized if security is given to Her Majesty in a form and amount that is satisfactory to the Minister.

. . .

71.1 (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order the person to pay the Minister an amount of money as compensation for any costs incurred in the seizure, storage or disposition of any fish or other thing seized under this Act by means of or in relation to which the offence was committed.

(2) Where a court orders a person to pay an amount of money as compensation under subsection (1), the amount and any interest payable on that amount constitute a debt due to Her Majesty and may be recovered as such in any court of competent jurisdiction.

72. (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty.

(2) Where a person is convicted of an offence under this Act that relates to fish seized pursuant to paragraph 51(*a*), the court shall, in addition to any punishment imposed, order that the fish, or any proceeds realized from its disposition, be forfeited to Her Majesty.

(3) Where a person is charged with an offence under this Act that relates to fish seized pursuant to paragraph 51(*a*) and the person is acquitted but it is proved that the fish was caught in contravention of this Act or the regulations, the court may order that the fish, or any proceeds realized from its disposition, be forfeited to Her Majesty.

. . .

73.1 (1) Subject to subsection (2), any fish or other thing seized under this Act, or any proceeds realized from its disposition, that are not forfeited to Her Majesty under section 72 shall, on the final conclusion of the proceedings relating to the fish or thing, be delivered to the person from whom the fish or thing was seized.

retenus jusqu'à ce que leur confiscation soit prononcée ou qu'une décision définitive soit rendue lors des poursuites intentées à leur égard.

(2) Sous réserve du paragraphe 72(4), le tribunal peut ordonner la restitution au saisi du poisson ou des objets saisis, sur fourniture à Sa Majesté d'une garantie que le ministre juge acceptable quant au montant et à la forme.

. . .

71.1 (1) Le tribunal qui déclare une personne coupable d'une infraction à la présente loi peut, en sus de toute autre peine infligée, ordonner au contrevenant d'indemniser le ministre des frais engagés dans le cadre de la saisie, de la garde ou de l'aliénation du poisson ou des objets saisis qui ont servi ou donné lieu à la perpétration de l'infraction.

(2) L'indemnisation visée au paragraphe (1) et les intérêts afférents constituent une créance de Sa Majesté dont le recouvrement peut être poursuivi à ce titre devant toute juridiction compétente.

72. (1) Le tribunal qui déclare une personne coupable d'une infraction à la présente loi peut, en sus de toute autre peine infligée, ordonner que tout objet saisi qui a servi ou donné lieu à la perpétration de l'infraction — ou le produit de son aliénation — soit confisqué au profit de Sa Majesté.

(2) Le tribunal qui déclare une personne coupable d'avoir commis une infraction à la présente loi relativement à du poisson saisi en vertu de l'alinéa 51*a*) est tenu, en sus de toute autre peine infligée, d'ordonner la confiscation au profit de Sa Majesté du poisson ou du produit de son aliénation.

(3) Le tribunal qui acquitte une personne accusée d'une infraction à la présente loi relativement à du poisson saisi en vertu de l'alinéa 51*a*) peut ordonner la confiscation au profit de Sa Majesté du poisson ou du produit de son aliénation s'il est prouvé que ce poisson a été pêché en contravention avec cette loi ou ses règlements.

. . .

73.1 (1) Sous réserve du paragraphe (2), lorsque, à l'issue des procédures portant sur le poisson ou les objets saisis, le tribunal n'a pas ordonné leur confiscation ou celle du produit de leur aliénation, les objets ou le produit sont remis au saisi.

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(2) Subject to subsection 72(4), where a person is convicted of an offence relating to any fish or other thing seized under this Act and the court imposes a fine but does not order forfeiture,

(*a*) the fish or thing may be detained until the fine is paid;

(*b*) it may be sold under execution in satisfaction of the fine; or

(*c*) any proceeds realized from its disposition may be applied in payment of the fine.

. . .

75. (1) Where any thing other than fish is forfeited to Her Majesty under subsection 72(1) or (4), any person who claims an interest in the thing as owner, mortgagee, lienholder or holder of any like interest, other than a person convicted of the offence that resulted in the forfeiture or a person from whom the thing was seized, may, within thirty days after the forfeiture, apply in writing to a judge for an order pursuant to subsection (4).

. . .

(4) Where, on the hearing of an application made pursuant to subsection (1), it is made to appear to the satisfaction of the judge,

(*a*) that the applicant is innocent of any complicity in the offence or alleged offence that resulted in the forfeiture and of any collusion in relation to that offence with the person who was convicted of, or who may have committed, the offence, and

(*b*) that the applicant exercised all reasonable care in respect of the person permitted to obtain the possession of the thing in respect of which the application is made to satisfy himself that the thing was not likely to be used contrary to this Act or the regulations, or, in the case of a mortgagee or lienholder, that he exercised such care with respect to the mortgagor or the liengiver,

the applicant is entitled to an order declaring that his interest is not affected by the forfeiture and declaring the nature and extent of his interest.

(2) Sous réserve du paragraphe 72(4), les règles qui suivent s'appliquent lorsqu'une personne est déclarée coupable d'une infraction portant sur le poisson ou les objets saisis et que le tribunal inflige une amende mais n'ordonne pas la confiscation :

a) le poisson ou les objets peuvent être retenus jusqu'à l'acquittement de l'amende;

b) ils peuvent être vendus par adjudication forcée pour paiement de l'amende;

c) le produit de toute aliénation peut être affecté au paiement de l'amende.

. . .

75. (1) Sauf lorsqu'il s'agit de poisson confisqué, toute personne — autre que celle qui a été déclarée coupable de l'infraction ayant entraîné la confiscation, ou que le saisi — qui prétend avoir un droit sur un objet confisqué en vertu des paragraphes 72(1) ou (4), à titre de propriétaire, de créancier hypothécaire ou de titulaire de privilège ou de tout droit semblable, peut, dans les trente jours qui suivent la confiscation, demander par écrit à un juge de rendre l'ordonnance prévue au paragraphe (4).

. . .

(4) Le juge fait droit à la requête en rendant une ordonnance déclarant que la confiscation ne porte pas atteinte au droit du demandeur et précisant la nature et l'étendue de ce droit si, à l'audition de la demande, il constate la réunion des conditions suivantes :

a) il n'y a eu, à l'égard de l'infraction, réelle ou présumée, qui a entraîné la confiscation, aucune complicité ou collusion entre le demandeur et, selon le cas, la personne déclarée coupable ou tout auteur potentiel de l'infraction;

b) le demandeur a pris bien soin de s'assurer que l'objet ou le poisson visé par la demande ne servirait pas à la perpétration d'un acte contraire à la présente loi ou à ses règlements par la personne qui s'en est vue attribuer la possession ou, dans le cas d'un créancier hypothécaire ou d'un titulaire de privilège ou de droit semblable, le débiteur hypothécaire ou le débiteur assujetti au privilège ou droit en question.

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Federal Court Rules, C.R.C. 1978, c. 663

Rule 1007. (1) The Court may, either before or after final judgment, order any property under the arrest of the Court to be appraised, or to be sold with or without appraisement, and either by public auction or by private contract, and may direct what notice by advertisement or otherwise shall be given or may dispense with the same.

(2) Without limiting paragraph (1), the Court may, either before or after final judgment, order

(*a*) that, where any property is under the arrest of the Court, it be advertised for sale in accordance with directions contained in the order, which may include any or all of the following:

. . .

(vi) any other direction that seems appropriate to the circumstances of the particular case; or

(*b*) that an agent be employed for the sale of any such property, with authority to sell subject to such conditions as are stipulated in the order or subject to subsequent approval by the Court, on such terms as to compensation of the agent for his services as may be stipulated in the order.

(3) If the property is deteriorating in value, the Court may order it to be sold forthwith.

. . .

(7) As soon as possible after the execution of a commission of sale, the marshal shall pay into court the gross proceeds of the sale, and shall with the commission file his accounts and vouchers in support thereof.

. . .

Rule 1008. (1) When an application is made for payment out of any money paid into court under Rule 1007(7), the Court has power to determine the rights of all claimants thereto and may make such order and give such directions as will enable the Court to adjudicate upon the rights of all claimants to such money and to order payment out to any person of any such money or portion thereof in accordance with its findings.

. . .

Rule 1010. (1) Where property against which an action *in rem* has been brought is under arrest or money repre-

Règles de la Cour fédérale, C.R.C. 1978, ch. 663

Règle 1007. (1) La Cour pourra, avant ou après le jugement final, ordonner que des biens saisis sur son ordre soient évalués, ou soient vendus, après avoir été évalués ou non, soit aux enchères publiques, soit par contrat privé, et elle peut prescrire quel avis doit être donné à ce sujet sur publicité ou autrement, ou peut dispenser de donner avis.

(2) Sous réserve de l'alinéa (1), la Cour pourra, avant ou après le jugement final, ordonner que,

a) lorsqu'un bien est sous la saisie de la Cour, il soit mis en vente par des annonces selon les instructions contenues dans l'ordonnance qui peuvent comprendre l'une ou toutes les modalités suivantes :

. . .

(vi) pourront être émises toutes autres instructions appropriées aux circonstances; ou

b) qu'un agent ou courtier soit utilisé pour la vente de ces biens, avec l'autorisation de vendre aux conditions mentionnées dans l'ordonnance ou sous réserve d'une approbation subséquente de la Cour et selon un dédommagement pour les services de l'agent ou du courtier fixé dans l'ordonnance.

(3) Si les biens perdent de leur valeur, la Cour pourra ordonner de les vendre immédiatement.

. . .

(7) Dès que possible après l'exécution d'une commission de vente, le prévôt doit consigner à la Cour le produit brut de la vente, et il doit déposer, avec la commission, ses comptes et pièces à l'appui.

. . .

Règle 1008. (1) En cas de demande de versement par prélèvement sur de l'argent consigné au tribunal en vertu de la Règle 1007(7), la Cour aura le pouvoir de déterminer les droits de tous les réclamants sur cet argent et elle pourra rendre l'ordonnance et donner les instructions qui lui permettront de statuer sur les droits que possèdent tous les réclamants sur cet argent, et elle a également le pouvoir d'ordonner le versement à une personne de tout ou partie de cet argent selon ses conclusions.

. . .

Règle 1010. (1) Lorsque des biens visés par une action *in rem* sous saisie ou que l'argent représentant le produit

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senting the proceeds of sale of property against which such an action has been brought is in court, a person who claims an interest in the property or money but who is not a defendant in the action may, with leave of the Court, intervene in the action.

de la vente des biens visés par une telle action se trouve consigné à la Cour, une personne qui prétend avoir un droit afférent aux biens ou à l'argent mais qui n'est pas défenderesse à l'action peut, avec la permission de la Cour, intervenir dans l'action.

III. Issue and Principal Arguments of the Parties

III. La question en litige et les principaux arguments des parties

21 The basic issue on appeal is whether the Newfoundland Court of Appeal erred in reversing the sentencing judge's order for forfeiture of proceeds of the vessel. The focus of argument is on the proper interpretation of the scope of the power to order the forfeiture of proceeds under s. 72(1) of the *Fisheries Act*: can it cover proceeds from the sale of a ship or is it limited to those proceeds realized from a sale of perishables pursuant to s. 70(3) of the Act?

La question fondamentale dans le présent pourvoi est celle de savoir si la Cour d'appel de Terre-Neuve a commis une erreur en infirmant l'ordonnance de confiscation du produit de la vente du navire rendue par le juge chargé de déterminer la peine. Les arguments portent surtout sur l'interprétation juste de l'étendue du pouvoir d'ordonner la confiscation du produit de la vente que confère le par. 72(1) de la *Loi sur les pêches* : ce pouvoir peut-il viser le produit de la vente d'un navire ou se limite-t-il au produit de la vente de marchandises périssables sous le régime du par. 70(3) de la Loi?

22 The appellant submits that the Court of Appeal erred by interpreting the power to make an order of forfeiture under s. 72(1) of the *Fisheries Act* too narrowly. She argues that the plain language of s. 72(1) supports a broader interpretation, one that permits the court to make an order of forfeiture against the proceeds of sale of a vessel, even where the sale of the vessel was made under the authority of another court. The appellant says that such an interpretation is necessary to harmonize the *Fisheries Act*, with the *Federal Court Act*, R.S.C. 1985, c. F-7, and the *Federal Court Rules*.

L'appelante soutient que la Cour d'appel a commis une erreur en interprétant de façon trop restrictive le pouvoir de rendre une ordonnance de confiscation prévu au par. 72(1) de la *Loi sur les pêches*. Elle prétend que le sens ordinaire du par. 72(1) appuie une interprétation plus large permettant au tribunal de rendre une ordonnance de confiscation du produit de la vente d'un navire même lorsque la vente du navire a été ordonnée par un autre tribunal. L'appelante affirme qu'une telle interprétation est nécessaire pour harmoniser la *Loi sur les pêches* avec la *Loi sur la Cour fédérale*, L.R.C. 1985, ch. F-7, et les *Règles de la Cour fédérale*.

23 The respondent adopts the position taken by the Newfoundland Court of Appeal in this case. The respondent argues that the only proceeds that are subject to forfeiture under the *Fisheries Act* are the proceeds of perishables sold pursuant to s. 70(3). The respondent says that the *Fisheries Act* should be interpreted as requiring the continued physical detention of a thing seized as a necessary precondition to an order of forfeiture of that thing. Thus, in this case, the sale of the vessel under the authority of the Federal Court precluded the sentencing

L'intimée adopte la position de la Cour d'appel de Terre-Neuve en l'espèce. D'après elle, le seul produit susceptible de confiscation en vertu de la *Loi sur les pêches* est le produit de l'aliénation des marchandises périssables prévue au par. 70(3). Elle affirme qu'il faut interpréter la *Loi sur les pêches* comme prévoyant que la rétention matérielle continue du bien saisi constitue une condition préalable nécessaire au prononcé d'une ordonnance de confiscation de ce bien. En l'espèce, la vente du navire ordonnée par la Cour fédérale empêchait donc le

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court from imposing a valid order of forfeiture against the proceeds of the vessel as part of the sentence in this case. The respondent says that such an interpretation is consistent with the scheme of the Act and the presumption of innocence.

IV. Analysis

A. *Background: The Fisheries Act and the Power of Forfeiture*

It is convenient at this stage to provide some background to the *Fisheries Act* and the specific provision at issue in this appeal. The principal object of the *Fisheries Act* has been found by a number of appellate courts to be that as summarized by the Nova Scotia Court of Appeal in *R. v. Savory* (1992), 108 N.S.R. (2d) 245, at para. 14:

> The *Act* and the *Regulations* have been passed for the purpose of regulating the fishery; regulatory legislation should be given a liberal interpretation. A major objective of the *Act* and the *Regulations* is to properly manage and control the commercial fishery.

See also *R. v. Corcoran* (1997), 153 Nfld. & P.E.I.R. 318, at paras. 22-25; *R. v. Vautour* (2000), 226 N.B.R. (2d) 226 (Q.B.), at paras. 10-11 and 13; *R. v. Chute* (1997), 160 N.S.R. (2d) 378 (C.A.).

As noted by the sentencing judge in this case, serious problems exist in the Atlantic fishing industry:

> It is common knowledge that the fish stocks on the Grand Banks as well as elsewhere in the Atlantic fishery waters of Canada have been seriously depleted.
>
> Canada has passed certain laws to enable this country to carry out proper conservation measures. NAFO was organized for the conservation of fish stocks by setting various quotas and regulations. The regulations are aimed at the regulation of the fishing industry with a view to the preservation of fishery resources which are crucial to the operation and continuation of an important Canadian industry.

tribunal chargé de déterminer la peine d'imposer une ordonnance valide de confiscation du produit de la vente du navire comme l'un des éléments de la peine. L'intimée affirme que cette interprétation est compatible avec l'économie de la Loi et la présomption d'innocence.

IV. Analyse

A. *Historique : La Loi sur les pêches et le pouvoir de confiscation*

Il convient à ce stade-ci de fournir certaines données historiques sur la *Loi sur les pêches* et les dispositions particulières en cause dans le présent pourvoi. Un certain nombre de tribunaux d'appel ont jugé que l'objet principal de la *Loi sur les pêches* correspondait à celui que la Cour d'appel de la Nouvelle-Écosse a résumé dans l'arrêt *R. c. Savory* (1992), 108 N.S.R. (2d) 245, par. 14 : 24

> [TRADUCTION] La *Loi* et son *Règlement* ont été adoptés afin de réglementer les pêches, et les mesures de réglementation devraient s'interpréter de façon large. Un objectif important de la *Loi* et du *Règlement* est de régir et de surveiller convenablement la pêche commerciale.

Voir également *R. c. Corcoran* (1997), 153 Nfld. & P.E.I.R. 318, par. 22-25; *R. c. Vautour* (2000), 226 R.N.-B. (2e) 226 (B.R.), par. 10, 11 et 13; *R. c. Chute* (1997), 160 N.S.R. (2d) (C.A.).

Comme l'a souligné le juge chargé de déterminer la peine en l'espèce, l'industrie de la pêche de l'Atlantique éprouve de graves problèmes : 25

> [TRADUCTION] Le grave déclin des stocks de poisson dans les Grands Bancs de Terre-Neuve et ailleurs dans les zones de pêche canadiennes de l'Atlantique est un fait notoire.
>
> Le Canada a adopté certaines lois lui permettant de prendre des mesures de conservation appropriées. L'OPANO a été mise sur pied pour favoriser la conservation des stocks de poisson par l'établissement de différents quotas et de différentes dispositions réglementaires. Ces dernières visent à réglementer l'industrie de la pêche et à préserver les ressources halieutiques, vitales pour l'exploitation et la survie d'une importante industrie canadienne.

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In order to garner support for Canadian concerns over excessive fishing on the nose and tail of the Grand Banks, Canada has to demonstrate its ability to control its own vessels.

26 One of the ways that Parliament has seen fit to support the proper management and control of the commercial fishery is to provide the courts with the power to impose significant penalties upon conviction of offences under the *Fisheries Act*. The most recent amendments to the *Fisheries Act*, enacted in 1991, were primarily concerned with increasing the severity of penalties to deter the abuse of the fishery resource and make it uneconomical for rogue fishermen to flout the *Fisheries Act* and the Regulations. For instance, Parliament increased the fines for those who violate the Regulations in the Convention Area to a maximum of $500,000.

27 Parliament also amended the power to order forfeiture of property seized under the *Fisheries Act* and the proceeds of sale of such property. The power of forfeiture has long been one of the penalties available to courts in sentencing persons convicted of offences under the *Fisheries Act*. That power is contained in s. 72, the provision at issue in this appeal. Prior to the 1991 amendments, the authority to order forfeiture of proceeds was limited to proceeds arising from a sale of perishables under s. 71(3) (now s. 70(3)). Section 72 provided as follows:

72. (1) Where a person is convicted of an offence under this Act or the regulations, the convicting court or judge may, in addition to any punishment imposed, order that any thing seized pursuant to subsection 71(1), or the whole or any part of the proceeds of a sale referred to in subsection 71(3), be forfeited and, on such an order being made, the thing so ordered to be forfeited is forfeited to Her Majesty in right of Canada.

Section 71(3), for its part, provided:

71. . . .

Pour recueillir des appuis à l'égard de ses préoccupations concernant la pêche excessive sur le nez et la queue des Grands Bancs, le Canada doit démontrer sa capacité de contrôler ses propres navires.

L'une des façons dont le législateur a jugé bon de favoriser la gestion et le contrôle appropriés de la pêche commerciale consiste à conférer aux tribunaux le pouvoir d'infliger des peines très sévères en cas de déclaration de culpabilité pour des infractions prévues à la *Loi sur les pêches*. Les plus récentes modifications à la *Loi sur les pêches*, édictées en 1991, visaient principalement à accroître la sévérité des peines afin de dissuader l'utilisation abusive des ressources halieutiques et de faire en sorte qu'il ne soit pas rentable pour les pêcheurs malhonnêtes de faire fi de la *Loi sur les pêches* et du Règlement. Par exemple, le législateur a augmenté et fixé à 500 000 $ le montant maximal des amendes dont sont passibles les personnes qui contreviennent au Règlement dans la zone régie par la convention.

Le législateur a aussi modifié le pouvoir d'ordonner la confiscation des biens saisis en vertu de la *Loi sur les pêches* et du produit de leur vente. Le pouvoir de confiscation est l'une des peines dont disposent depuis longtemps les tribunaux lorsqu'ils déterminent la peine de personnes déclarées coupables d'une infraction prévue à la *Loi sur les pêches*. Ce pouvoir est énoncé à l'art. 72, soit la disposition en cause dans le présent pourvoi. Avant les modifications de 1991, cette disposition limitait le pouvoir d'ordonner la confiscation du produit de la vente au produit de la vente de marchandises périssables que prévoyait le par. 71(3) (maintenant le par. 70(3)). Voici le libellé de l'ancienne disposition :

72. (1) Le tribunal ou le juge peuvent, en sus de toute autre peine imposée à la personne déclarée coupable d'une infraction à la présente loi ou à ses règlements, ordonner la confiscation de tout objet ou poisson saisi, ou du produit, en tout ou en partie, de la vente. Le cas échéant, la confiscation s'opère au profit de Sa Majesté du chef du Canada dès que l'ordonnance est rendue.

Quant au par. 71(3), il prévoyait :

71. . . .

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(3) Where, in the opinion of the person having custody of any thing seized pursuant to subsection (1), the thing will rot, spoil or otherwise perish, that person may sell the thing in such manner and for such price as that person may determine.

However, since the 1991 amendments, and at all times material to this appeal, s. 72 has provided as follows:

72. (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty.

B. *Principles of Statutory Interpretation*

In numerous cases, this Court has endorsed the approach to the construction of statutes set out in the following passage from Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 87:

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.

This famous passage from Driedger "best encapsulates" our Court's preferred approach to statutory interpretation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 and 23. Driedger's passage has been cited with approval by our Court on frequent occasions in many different interpretive settings which need not be mentioned here.

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* admiralty jurisdiction of the Federal Court under the *Federal Court Act*, in considering the "entire context" of s. 72(1) and the intent of Parliament, it is important to keep in mind the principles for harmonizing different statutes. Professor Ruth Sullivan expressed these principles as follows, in *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 288:

(3) Si elle estime que des marchandises saisies en vertu du paragraphe (1) risquent de se détériorer, la personne qui en a la garde peut les vendre selon les modalités et aux prix qu'elle détermine.

Toutefois, depuis les modifications de 1991, l'art. 72 prévoit, et prévoyait pendant toute la période pertinente :

72. (1) Le tribunal qui déclare une personne coupable d'une infraction à la présente loi peut, en sus de toute autre peine infligée, ordonner que tout objet saisi qui a servi ou donné lieu à la perpétration de l'infraction — ou le produit de son aliénation — soit confisqué au profit de Sa Majesté.

B. *Les principes d'interprétation des lois*

28 Dans de nombreux arrêts, notre Cour a retenu le principe d'interprétation des lois contenu dans l'extrait suivant de Driedger, à la p. 87 de son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) :

[TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

29 Cet extrait célèbre de Driedger « résume le mieux » la méthode que privilégie notre Cour en matière d'interprétation des lois : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21 et 23. Notre Cour a cité avec approbation ce passage de Driedger à de nombreuses occasions et dans différents contextes d'interprétation qu'il n'y a pas lieu de mentionner en l'espèce.

30 Compte tenu de l'interaction, en l'espèce, entre la compétence *in personam* dont la Cour suprême de Terre-Neuve est investie en application de la *Loi sur les pêches* et de la compétence *in rem* en matière d'amirauté que la *Loi sur la Cour fédérale* confère à la Cour fédérale, il est important de garder à l'esprit les principes d'harmonisation des lois en examinant le « contexte global » du par. 72(1) et l'intention du législateur. Le professeur Ruth Sullivan a exprimé ainsi ces principes dans son ouvrage intitulé *Driedger on the Construction of Statutes* (3e éd. 1994), p. 288 :

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The meaning of words in legislation depends not only on their immediate context but also on a larger context which includes the Act as a whole and the statute book as a whole. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. . . . Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred.

[TRADUCTION] Le sens des mots dans un texte législatif ne dépend pas seulement de leur contexte immédiat, mais aussi d'un contexte plus large, qui comprend l'ensemble de la Loi et l'ensemble des lois en vigueur. Les présomptions de cohérence et d'uniformité d'expression s'appliquent non seulement aux lois traitant d'une même matière, mais aussi quoique avec moins de force à l'ensemble des lois adoptées par le législateur. [. . .] Par conséquent, toutes choses étant égales par ailleurs, on retiendra les interprétations qui réduisent la possibilité de contradiction ou d'incohérence parmi les différentes lois.

C. *Application of Principles of Statutory Interpretation: Section 72 and the Scope of the Power to Order Forfeiture*

1. Grammatical and Ordinary Meaning

31 In interpreting the scope of the power to order forfeiture of proceeds under the *Fisheries Act*, it is natural to begin by considering the grammatical and ordinary meaning the words of s. 72(1). As already noted, s. 72(1) provides:

72. (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty. [Emphasis added.]

32 The possessive pronoun in the phrase "any proceeds realized from its disposition" clearly refers to the antecedent "any thing seized under the Act" in the preceding clause. Section 51 is the exclusive source of the power to seize property under the *Fisheries Act*. It provides for the seizure of "any fishing vessel, vehicle, fish or other thing that [a fishery] officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act . . . ". Therefore, in light of the kinds of property subject to seizure under s. 51, reading the words in s. 72(1) in their ordinary and grammatical sense, the provision clearly contemplates the making of an order of forfeiture of the proceeds of disposition of a vessel seized under the Act. Furthermore, it is notable that the proceeds subject to forfeiture are not lim-

C. *L'application des principes d'interprétation des lois : L'article 72 et l'étendue du pouvoir d'ordonner la confiscation*

1. Le sens ordinaire et grammatical

Dans l'interprétation de l'étendue du pouvoir d'ordonner la confiscation du produit de la vente que confère la *Loi sur les pêches*, il est normal de commencer par l'examen du sens ordinaire et grammatical du libellé du par. 72(1). Comme nous l'avons vu, cette disposition prévoit :

72. (1) Le tribunal qui déclare une personne coupable d'une infraction à la présente loi peut, en sus de toute autre peine infligée, ordonner que tout objet saisi qui a servi ou donné lieu à la perpétration de l'infraction — ou le produit de son aliénation — soit confisqué au profit de Sa Majesté. [Je souligne.]

Le pronom possessif figurant dans l'expression « le produit de son aliénation » renvoie manifestement à l'antécédent « tout objet saisi » figurant dans la proposition qui précède. L'article 51 constitue l'unique source du pouvoir de saisir des biens prévu par la *Loi sur les pêches*. Cette disposition permet de saisir « les bateaux de pêche, les véhicules, le poisson et tous autres objets dont [l'agent des pêches ou le garde-pêche] a des motifs raisonnables de croire qu'ils ont été obtenus par la perpétration d'une infraction à la présente loi . . . ». En conséquence, si on interprète les termes utilisés au par. 72(1) dans leur sens ordinaire et grammatical, en tenant compte du type de biens susceptibles de saisie aux termes de l'art. 51, il est clair que la portée du par. 72(1) s'étend au prononcé d'une ordonnance de confiscation du produit de l'aliénation

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ited to those proceeds realized through dispositions made under the *Fisheries Act*.

2. Legislative History and the Intention of Parliament

To understand the scope of s. 72(1), it is useful to consider its legislative evolution. Prior enactments may throw some light on the intention of Parliament in repealing, amending, replacing or adding to a statute: *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 667, *per* Pigeon J., cited approvingly by Major J. in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, at para. 13. As noted above, a former version of the forfeiture provision did limit the scope of the power to order forfeiture of proceeds to the proceeds of a disposition of perishables made under s. 71(3) of the Act (now s. 70(3)). However, in 1991, s. 72(1) was amended and the language limiting the scope of the power to order forfeiture of proceeds was removed. Indeed, this was the only meaningful change made to s. 72(1). A review of the Minutes of Proceedings of the Legislative Committee and the Parliamentary debates in Hansard offers little insight into the intention of Parliament in making this change in the forfeiture provision. In fact, no references were made to this specific provision in either the Committee hearings or the Parliamentary debate that preceded its amendment. However, it is clear that as a whole, the 1991 amendments to the *Fisheries Act* were intended to modernize the legislation, and to increase the flexibility and severity of penalties for *Fisheries Act* offences.

It is possible that the removal of the reference to the proceeds of a disposition of perishables, in favour of a general reference to the proceeds of "any thing seized under this Act", was intended by the drafters merely to streamline the language of the section, and not to broaden the scope of forfeiture as it relates to proceeds. However, there is a

d'un navire saisi en vertu de la Loi. Il faut en outre souligner que le produit susceptible de confiscation n'est pas uniquement le produit d'une aliénation faite en vertu de la *Loi sur les pêches*.

2. L'historique de la Loi et l'intention du législateur

33 Pour comprendre la portée du par. 72(1), il est utile d'examiner son évolution sur le plan législatif. Les textes antérieurs sont de nature à jeter de la lumière sur l'intention qu'avait le législateur en les abrogeant, les modifiant, les remplaçant ou y ajoutant : *Gravel c. Cité de St-Léonard*, [1978] 1 R.C.S. 660, p. 667, le juge Pigeon, cité avec approbation par le juge Major dans l'arrêt *Amos c. Insurance Corp. of British Columbia*, [1995] 3 R.C.S. 405, par. 13. Comme je l'ai mentionné précédemment, l'ancienne disposition prévoyant la confiscation limitait l'étendue du pouvoir d'ordonner la confiscation au produit de la vente de marchandises périssables effectuée en vertu du par. 71(3) de la Loi (maintenant le par. 70(3)). Toutefois, en 1991, le par. 72(1) a été modifié et les termes limitant l'étendue du pouvoir d'ordonner la confiscation du produit de la vente ont été supprimés. Il s'agit d'ailleurs du seul changement important apporté au par. 72(1). L'examen des Procès-verbaux du Comité législatif et des Débats parlementaires publiés dans le Hansard ne nous éclaire pas beaucoup sur l'intention qu'avait le législateur en apportant cette modification à la disposition relative à la confiscation. En fait, le par. 72(1) n'a pas été mentionné dans le cadre des audiences du comité et des débats parlementaires qui ont précédé sa modification. Il est toutefois clair que, dans l'ensemble, les modifications apportées en 1991 à la *Loi sur les pêches* visaient à moderniser cette loi et à accroître la souplesse et la sévérité des peines reliées aux infractions prévues dans la *Loi sur les pêches*.

34 En supprimant la mention du produit de la vente de marchandises périssables pour la remplacer par la mention générale du produit de « tout objet saisi », les rédacteurs visaient peut-être uniquement à simplifier le libellé de l'article, et non pas à élargir l'étendue de la confiscation en ce qui a trait au produit. Il existe toutefois une présomption

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presumption that amendments to the wording of a legislative provision are made for some intelligible purpose, such as to clarify the meaning, to correct a mistake, or to change the law: see Sullivan, *supra*, at p. 450. Laskin J. (as he then was) applied this presumption in *Bathurst Paper Ltd. v. Minister of Municipal Affairs of New Brunswick*, [1972] S.C.R. 471, at pp. 477-78. Writing for the Court, he held that "[l]egislative changes may reasonably be viewed as purposive, unless there is internal or admissible external evidence to show that only language polishing was intended". In this case, through its wholesale removal of specific limiting language, the effect of the 1991 amendment to s. 72(1) is 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, as recorded in Hansard, to increase the flexibility and severity of available penalties for *Fisheries Act* offences.

35 Before this Court, counsel did not initially refer to the legislative history of the forfeiture provision. It appears that the Court of Appeal did not benefit from argument on the effect of the 1991 amendments on the proper interpretation of the scope of the power to order forfeiture. Nevertheless, in combination, the grammatical and ordinary meaning of the words in s. 72(1) and the intention of Parliament as indicated by the legislative history of the provision do support a broader interpretation of the scope of the forfeiture power than was given by the Court of Appeal.

3. The Scheme of the Act

36 As noted above, the *Fisheries Act* creates offences and imposes penalties in order to further its object of the proper management and control of the commercial fishing industry. In this appeal, we are particularly concerned with the scheme of that part of the *Fisheries Act* falling under the heading "Disposition of Seized Things". The provisions in that part of the *Fisheries Act* provide authority to deal with the property of a person accused of an

selon laquelle les modifications du libellé d'une disposition législative poursuivent un but intelligible, comme préciser le sens, corriger une erreur ou modifier la loi : voir Sullivan, *op. cit.*, p. 450. Le juge Laskin (plus tard Juge en chef) a appliqué cette présomption dans l'arrêt *Bathurst Paper Ltd. c. Ministre des Affaires municipales du Nouveau-Brunswick*, [1972] R.C.S. 471, p. 477-478. S'exprimant au nom de notre Cour, il a statué qu'« [i]l est raisonnable de croire que les modifications aux lois ont un but, à moins que des indices intrinsèques, ou des indices extrinsèques recevables, démontrent qu'on n'ait voulu qu'en polir le style ». Compte tenu de la suppression totale des termes restrictifs, la modification apportée en 1991 au par. 72(1) a pour effet d'élargir la portée de la disposition relative à la confiscation en y intégrant le pouvoir de confisquer le produit de la vente d'un navire. Cet effet est conforme à l'intention du législateur, consignée dans le Hansard, qui consiste à accroître la souplesse et la sévérité des peines applicables aux infractions prévues dans la *Loi sur les pêches*.

À l'origine, les avocats n'ont pas porté l'historique législatif de la disposition relative à la confiscation à l'attention de notre Cour. La Cour d'appel n'a pas eu l'avantage d'entendre des arguments concernant l'effet des modifications de 1991 sur l'interprétation juste de l'étendue du pouvoir d'ordonner la confiscation. Quoi qu'il en soit, le sens ordinaire et grammatical du libellé du par. 72(1) et l'intention du législateur qui ressort de l'historique législatif de cette disposition appuient, ensemble, une interprétation de l'étendue du pouvoir de confiscation plus large que celle retenue par la Cour d'appel.

3. Le régime établi par la Loi

Comme je l'ai mentionné précédemment, la *Loi sur les pêches* crée des infractions et impose des peines dans le but de favoriser la réalisation de son objet, savoir la gestion et le contrôle appropriés de l'industrie de la pêche commerciale. Dans le présent pourvoi, nous nous intéressons en particulier à l'économie de la partie de la *Loi sur les pêches* intitulée « Aliénation des objets saisis ». Les dispositions figurant dans cette partie confèrent le

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offence under the *Fisheries Act*. Fisheries officers have the authority to seize property that they have reasonable grounds to believe was involved in the commission of an offence under the *Fisheries Act* (s. 51). Seized property can be detained until forfeiture or the close of proceedings (s. 71(1)), or returned to the owner upon the posting of security (s. 71(2)). Persons convicted of an offence may be responsible to compensate the Crown for costs incurred in the seizure, storage, or disposition of seized property (s. 71.1). Except in respect of perishables (s. 70(3)), there is no authority to dispose of or forfeit property before conviction and the close of proceedings under the *Fisheries Act*. Upon conviction, property can be ordered forfeited to Her Majesty (s. 72) or applied to the payment of fines (s. 73.1(2)). An innocent party that claims an interest in forfeited property may apply for an order declaring that his or her interest is not affected by the forfeiture (s. 75(1)).

pouvoir de disposer des biens de la personne accusée d'une infraction prévue par la *Loi sur les pêches*. Les agents des pêches ont le pouvoir de saisir les biens dont ils ont des motifs raisonnables de croire qu'ils ont été obtenus par la perpétration d'une infraction à la *Loi sur les pêches* (art. 51). Les biens saisis peuvent être retenus jusqu'à ce que leur confiscation soit prononcée ou jusqu'à l'issue des poursuites intentées à leur égard (par. 71(1)), ou restitués à leur propriétaire sur fourniture d'une garantie (par. 71(2)). Les personnes déclarées coupables d'une infraction peuvent être tenues d'indemniser la Couronne des frais engagés dans le cadre de la saisie, de la garde ou de l'aliénation des biens saisis (art. 71.1). Sauf dans le cas des marchandises périssables (par. 70(3)), rien ne permet l'aliénation ou la confiscation des biens avant le prononcé d'une déclaration de culpabilité et l'issue des poursuites intentées en application de la *Loi sur les pêches*. Dans les cas où il y a déclaration de culpabilité, le tribunal peut ordonner que les biens soient confisqués au profit de Sa Majesté (art. 72) ou soient affectés au paiement des amendes (par. 73.1(2)). La partie innocente qui prétend avoir un droit sur un bien confisqué peut solliciter une ordonnance déclarant que la confiscation ne porte pas atteinte à son droit (par. 75(1)).

It makes sense that the *Fisheries Act* would deal exhaustively with property seized under the *Fisheries Act* given the special nature of the kinds of property at issue: fish, fishing vessels, and equipment. The respondent argues that s. 489.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, also applies to the seized property of a person accused of an offence under the *Fisheries Act*. However, s. 489.1 begins with the words, "Subject to this or any other Act of Parliament . . . ". Therefore, because the federal *Fisheries Act* also deals with the property of a person accused of an offence under that Act, in my view, s. 489.1 of the *Criminal Code* has no application in this case.

37 Il est logique que la *Loi sur les pêches* traite de façon exhaustive des biens saisis en vertu de la *Loi sur les pêches* compte tenu de la nature particulière du type de biens en question : du poisson, des bateaux de pêche et du matériel. L'intimée soutient que l'art. 489.1 du *Code criminel*, L.R.C. 1985, ch. C-46, s'applique également aux biens saisis d'une personne accusée d'une infraction à la *Loi sur les pêches*. Or, cet article commence par les mots suivants : « Sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale . . . ». En conséquence, comme la *Loi sur les pêches* fédérale porte aussi sur les biens d'une personne accusée d'une infraction à cette Loi, je suis d'avis que l'art. 489.1 du *Code criminel* ne s'applique pas en l'espèce.

In general, there is no authority under the Act to dispose of seized property before the close of proceedings. Thus, the scheme of the *Fisheries Act*

38 De façon générale, la Loi ne confère pas le pouvoir d'aliéner les biens saisis avant l'issue des poursuites intentées. Le régime établi par la *Loi*

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properly reflects the presumption of innocence and the related principle that the property of an accused should be preserved until culpability is finally determined. The rationale for excepting seized perishables from the application of these principles is obvious: the quality and value of perishables will deteriorate in storage, hence it is in the interest of an accused that the *Fisheries Act* allow for the timely disposition of seized perishables (see s. 70(3)). However, that the *Fisheries Act* otherwise preserves the property of an accused person is not fatal to the broader interpretation of the power to order forfeiture advanced by the appellant. The property of an accused person is protected under the *Fisheries Act vis-à-vis* the quasi-criminal process under that Act, but there is nothing in the scheme of the *Fisheries Act* that would extend that protection *vis-à-vis* another civil authority. In other words, a person charged with an offence under the *Fisheries Act* 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 the culpability of a person charged with an offence under the *Fisheries Act* has been finally determined, the presumption of innocence is spent and there is nothing expressed in the *Fisheries Act* that would immunize proceeds of sale realized pursuant to a civil authority from forfeiture. In this way, the scheme of the *Fisheries Act* is, at once, strict enough to preserve the seized property of an accused subject to prosecution under the *Fisheries Act*, and flexible enough to preserve the availability of the penalties necessary to achieve the object of the *Fisheries Act*.

sur les pêches reflète donc comme il se doit la présomption d'innocence et le principe connexe selon lequel il faut préserver les biens de l'accusé jusqu'à ce qu'une déclaration de culpabilité soit prononcée dans une décision définitive. Le motif pour lequel les marchandises périssables saisies sont soustraites à l'application de ces principes est évident : la qualité et la valeur des marchandises périssables diminuent lors de la garde, de sorte qu'il est dans l'intérêt de l'accusé que la *Loi sur les pêches* permette l'aliénation de ces marchandises en temps opportun (voir le par. 70(3)). Toutefois, le fait que la *Loi sur les pêches* préserve par ailleurs les biens de l'accusé n'empêche pas l'interprétation large du pouvoir d'ordonner la confiscation qu'a préconisée l'appelante. La *Loi sur les pêches* protège les biens de l'accusé dans le cadre de la procédure quasi pénale qu'elle prévoit, mais rien dans le régime établi par cette loi n'étend cette protection en matière civile. En d'autres termes, la personne accusée d'une infraction à la *Loi sur les pêches* ne peut invoquer la présomption d'innocence pour empêcher une personne ayant une demande *in rem* à faire valoir relativement à ses biens d'obtenir réparation ou pour retarder l'obtention de cette réparation. De même, une décision définitive qui établit la culpabilité d'une personne accusée d'une infraction à la *Loi sur les pêches* met fin à la présomption d'innocence et rien dans la *Loi sur les pêches* n'empêche la confiscation du produit d'une vente effectuée en matière civile. Ainsi, le régime établi par la *Loi sur les pêches* est à la fois suffisamment strict pour préserver les biens saisis d'une personne poursuivie en vertu de la *Loi sur les pêches* et suffisamment souple pour préserver le pouvoir d'imposer les peines nécessaires à la réalisation de l'objet de la *Loi sur les pêches*.

4. The Legislative Context

(a) *Treatment of Proceeds under the Fisheries Act*

39 The remaining factor to consider is the legislative context in which s. 72(1) exists. In interpreting the s. 72(1) power to order forfeiture narrowly, the Court of Appeal relied in part on the treatment of proceeds in the preceding, consecutive ss. 70(3)

4. Le contexte législatif

a) *Le traitement du produit de la vente prescrit par la Loi sur les pêches*

Le dernier facteur à examiner est le contexte législatif du par. 72(1). Pour interpréter de façon restrictive le pouvoir d'ordonner la confiscation que confère le par. 72(1), la Cour d'appel s'est fondée en partie sur le traitement du produit de la

and 71(1). Taken together, those subsections read as follows:

70. . . .

(3) A fishery officer or fishery guardian who has custody of any fish or other perishable thing seized under this Act may dispose of it in any manner the officer or guardian considers appropriate and any proceeds realized from its disposition shall be paid to the Receiver General.

71. (1) Subject to this section, any fish or other thing seized under this Act, or any proceeds realized from its disposition, may be detained until the fish or thing or proceeds are forfeited or proceedings relating to the fish or thing are finally concluded.

It has been argued that because the phrase "any proceeds realized from its disposition" first appears in s. 70(3), and in that context is limited to proceeds of perishables, the phrase should continue to be read as being so limited when it appears in subsequent sections of the *Fisheries Act*. Furthermore, as an illustration of the above proposition, it is argued that s. 71(1) makes better sense if "any proceeds realized from its disposition", as it appears in that subsection, refers only to s. 70(3) proceeds. It would be unusual that s. 71(1) of the *Fisheries Act* would purport to authorize the detention of the proceeds of disposition of a vessel made pursuant to an authority other than the *Fisheries Act*. The usual course would be for the authority under which the order for sale was made to detain any proceeds arising from that order. For example, in this case, the proceeds of the sale of the Kristina Logos are currently detained by the Receiver General for the benefit of the Federal Court, the source of the order for sale. This reasoning, it is argued, justifies applying the limited interpretation of "any proceeds" found in s. 70(3) to all subsequent subsections, including s. 72(1).

However, although a limited interpretation of "any proceeds" may arguably make better sense of s. 71(1), a purely grammatical interpretation of "any proceeds" is not beyond the rationale of that

vente prévu dans les paragraphes consécutifs qui précèdent cette disposition, soit les par. 70(3) et 71(1). Considérés ensemble, ces paragraphes prévoient :

70. . . .

(3) L'agent des pêches ou le garde-pêche qui a la garde de marchandises périssables saisies peut en disposer de la façon qu'il estime indiquée, le produit de l'aliénation étant versé au receveur général.

71. (1) Sous réserve des autres dispositions du présent article, le poisson ou les objets saisis en vertu de la présente loi ou le produit de leur aliénation peuvent être retenus jusqu'à ce que leur confiscation soit prononcée ou qu'une décision définitive soit rendue lors des poursuites intentées à leur égard.

40 On a prétendu qu'étant donné que l'expression « le produit de l'aliénation » apparaît pour la première fois au par. 70(3) et qu'elle se limite dans ce contexte aux marchandises périssables, elle doit continuer d'être interprétée en ce sens lorsqu'elle figure dans les dispositions suivantes de la *Loi sur les pêches*. Pour illustrer la proposition qui précède, on prétend en outre que le par. 71(1) est plus logique si l'expression « le produit de leur aliénation », qui figure dans cette disposition, renvoie uniquement au produit dont il est fait mention au par. 70(3). Il serait inusité que le par. 71(1) de la *Loi sur les pêches* vise à autoriser la rétention du produit de l'aliénation d'un navire effectuée en vertu d'un autre texte législatif que la *Loi sur les pêches*. Normalement, la juridiction qui a ordonné la vente devrait conserver le produit de la vente. Par exemple, le receveur général conserve actuellement le produit de la vente du Kristina Logos au profit de la Cour fédérale, dont émane l'ordonnance de vente. Ce raisonnement, prétend-on, justifie l'application à tous les paragraphes qui suivent, notamment au par. 72(1), de l'interprétation restrictive de l'expression « le produit » figurant au par. 70(3).

41 Toutefois, même s'il est possible de soutenir que le par. 71(1) est plus logique si l'on attribue une interprétation restrictive à l'expression « le produit », il ne perd pas sa raison d'être et ne

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provision, nor does it render it absurd. As noted above in respect of s. 72(1), read according to its ordinary and grammatical meaning, the phrase "any proceeds realized from its disposition" in s. 71 includes proceeds of vessels seized under the *Fisheries Act*. Thus, s. 71 merely makes a grant of authority to detain proceeds that is partly superfluous in that only in unusual circumstances could the s. 71 power to detain proceeds be practically exercised in respect of proceeds realized pursuant to an authority other than the *Fisheries Act*. Such circumstances could arise if the Federal Court were to make an order pursuant to Federal Court Rule 1007 that proceeds of sale be paid into court and held for the benefit of orders made by other courts. In addition, although there is no authority to dispose of seized property until after the close of proceedings, s. 71(1) of the *Fisheries Act* does provide for the detention of the proceeds of "any . . . thing seized under this Act". Furthermore, Federal Court Rule 1008 provides that the Federal Court has the power to determine the rights of all claimants to moneys paid into court pursuant to Rule 1007(7). Thus, it is difficult to differentiate, on a principled basis, between a situation where the Crown establishes a claim in the provincial court which is then executed in the Federal Court and the situation in this case where the provincial court purports to order forfeiture of monies in the hands of a Federal Court. In the result, one is not necessarily driven to infer, as the Court of Appeal concluded, that, taken together, ss. 70(3) and 71(1) serve to limit the grant of power to order forfeiture in s. 72(1).

devient pas absurde si on interprète cette expression selon son sens purement grammatical. Comme je l'ai mentionné précédemment relativement au par. 72(1), selon son sens ordinaire et grammatical, l'expression « le produit de leur aliénation » figurant à l'art. 71 englobe le produit de la vente des navires saisis en vertu de la *Loi sur les pêches*. Ainsi, l'art. 71 confère simplement un pouvoir de rétention du produit de la vente qui est en partie superflu, puisque ce n'est qu'exceptionnellement que ce pouvoir peut être exercé en pratique à l'égard du produit d'une vente effectuée en vertu d'un autre texte législatif que la *Loi sur les pêches*. Ce pourrait être le cas si la Cour fédérale statuait, dans une ordonnance fondée sur la règle 1007 des *Règles de la Cour fédérale*, que le produit de la vente doit être consigné à la Cour et retenu aux fins de l'exécution d'ordonnances émanant d'autres tribunaux. De plus, bien que rien ne permette l'aliénation des biens saisis avant l'issue des poursuites à leur égard, le par. 71(1) de la *Loi sur les pêches* prévoit la rétention du produit de la vente des « objets saisis en vertu de la présente loi ». En outre, selon la règle 1008 des *Règles de la Cour fédérale*, la Cour fédérale a le pouvoir de déterminer les droits de tous les réclamants sur l'argent consigné à la cour en vertu de la règle 1007(7). Il est donc difficile de faire la distinction, sur le plan des principes, entre le cas où la Couronne établit devant le tribunal provincial une réclamation exécutée par la suite en Cour fédérale et la situation en l'espèce où le tribunal provincial ordonne la confiscation de l'argent consigné à la Cour fédérale. En conséquence, ces considérations n'amènent pas nécessairement à conclure, comme l'a fait la Cour d'appel, que les par. 70(3) et 71(1), interprétés ensemble, limitent le pouvoir d'ordonner la confiscation conféré par le par. 72(1).

42 Indeed, had Parliament intended the phrase "any proceeds realized from its disposition" to be limited to proceeds of perishables in ss. 71(1) and 72(1), it could have done so expressly, as it did in s. 70(3), as well as ss. 72(2) and 72(3). Instead, a pattern in the use of the phrase at issue is evident whereby in some sections it is expressly limited to the proceeds of perishables and in other sections it

D'ailleurs, si le législateur avait voulu que les expressions « le produit de leur aliénation » et « le produit de son aliénation » figurant respectivement aux par. 71(1) et 72(1) se limitent au produit de la vente de marchandises périssables, il aurait pu le dire explicitement, comme il l'a fait au par. 70(3) ainsi qu'aux par. 72(2) et 72(3). Au contraire, un modèle se dessine clairement quant à l'utilisation

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refers more generally to all forms of property seized under the Act and proceeds thereof.

In addition, it is notable that ss. 70(3) and 71(1) are directed at the property of a person at a stage in the proceedings where the person is only accused of an offence. Whereas s. 72(1) is directed at the property of a person who has been convicted of an offence. Thus, ss. 70(3) and 71(1) are distinct from s. 72(1) in that the former address procedural matters and the later is in effect a sentencing provision. In this sense, s. 72 stands alone and apart from the immediately preceding sections. This would seem to run against the argument that one must read ss. 70(3), 71(1) and 72(1) together in interpreting the phrase "any proceeds realized from its disposition".

(b) *Continued Physical Detention*

The appellant argues that the Court of Appeal erred by finding that continued physical detention of seized property is a precondition to an order of forfeiture under s. 72(1). The only clear and express preconditions to such an order is the conviction of the accused. Otherwise, the words in s. 72(1) are equivocal on this point. A continued physical detention precondition might make sense were the word "seized" to be read only in the present tense. However, the word "seized" can also be read in the past tense and so may also refer to things formerly seized under the Act. Furthermore, the legal definition of "forfeiture" is "a divestiture of specific property without compensation": see *Black's Law Dictionary* (6th ed. 1990), at p. 650. It may be that after a bare divestiture of the property rights of the owner, without more, the title to property would necessarily vest in the party holding possession, i.e. the Crown, where the property was detained under its authority up until forfeiture. However, s. 72(1) reads "the court may . . . order that any thing . . . or any proceeds . . . be forfeited to Her Majesty". Thus, once forfeiture has been

des expressions en cause : dans certains articles, elles sont expressément limitées au produit de la vente des marchandises périssables, alors que dans d'autres dispositions, elles renvoient de façon plus générale à tous les genres de biens saisis en vertu de la Loi et au produit de leur vente.

43 Il faut aussi souligner que les par. 70(3) et 71(1) visent les biens d'une personne à l'étape des procédures où celle-ci est seulement accusée d'une infraction. Par contre, le par. 72(1) se rapporte aux biens d'une personne déclarée coupable d'une infraction. Les paragraphes 70(3) et 71(1) diffèrent donc du par. 72(1) : les premiers traitent de questions de procédure tandis que le dernier constitue en fait une disposition relative à la détermination de la peine. En ce sens, il faut prendre l'art. 72 isolément et le considérer séparément des articles qui le précèdent immédiatement. Cette distinction semble réfuter l'argument selon lequel il faut lire les par. 70(3), 71(1) et 72(1) conjointement pour interpréter les expressions « le produit de leur aliénation » et « le produit de son aliénation ».

b) *La rétention matérielle continue*

44 Selon l'appelante, la Cour d'appel a commis une erreur en concluant que la rétention matérielle continue des biens saisis constituait une condition préalable au prononcé d'une ordonnance de confiscation sous le régime du par. 72(1). La seule condition préalable claire et explicite au prononcé d'une telle ordonnance est la déclaration de culpabilité de l'accusé. Pour le reste, le libellé du par. 72(1) est équivoque sur cette question. L'existence d'une condition préalable de rétention matérielle continue pourrait être logique si le mot « saisi » était interprété uniquement au présent. Ce terme peut toutefois être interprété au passé et viser les objets saisis antérieurement en vertu de la Loi. En outre, la définition juridique du terme « confiscation » (« *forfeiture* ») est [TRADUCTION] « le retranchement d'un bien ou droit de propriété particulière sans indemnité » (« *a divestiture of specific property without compensation* ») : voir *Black's Law Dictionary* (6e éd. 1990), p. 650. Il se pourrait qu'après le simple retranchement des droits de propriété du propriétaire, sans plus, le titre de propriété des biens soit nécessairement

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ordered under s. 72(1), any rights to the property vest in Her Majesty, regardless of who has possession at the time of forfeiture. In other words, a continued physical detention is not expressly stated as a precondition to an order of forfeiture on the face of s. 72(1).

dévolu à la partie qui en a la possession, c'est-à-dire la Couronne, lorsqu'elle les retient dans l'exercice de ses pouvoirs jusqu'à la confiscation. Le paragraphe 72(1) indique toutefois que « [l]e tribunal [. . .] peut [. . .] ordonner que tout objet [. . .] ou le produit [. . .] soit confisqué au profit de Sa Majesté ». Par conséquent, une fois la confiscation ordonnée en vertu du par. 72(1), tous les droits de propriété des biens sont dévolus à Sa Majesté, peu importe qui en a la possession au moment de la confiscation. En d'autres termes, il ne ressort pas expressément du par. 72(1) que la rétention matérielle continue constitue une condition préalable au prononcé d'une ordonnance de confiscation.

45 However, the Court of Appeal inferred that continued physical detention is a necessary precondition to 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).

Toutefois, après avoir examiné les pouvoirs de saisie, de garde et de rétention prévus aux art. 51, 70 et 71, la Cour d'appel a conclu que la rétention matérielle continue était une condition préalable nécessaire à la confiscation. Selon la Cour d'appel (au par. 34) :

> [TRADUCTION] Il y a deux possibilités à la suite d'une saisie : le navire ou l'autre objet saisi sera soit retenu par l'agent des pêches ou son représentant, soit remis à son propriétaire, ce qui met fin à la saisie.

Malheureusement, la Cour d'appel n'a pas poussé son analyse assez loin à cet égard. Premièrement, elle n'a pas traité de la possibilité que les biens en question fassent l'objet d'une mainlevée de saisie sans être restitués à leur propriétaire parce qu'un autre tribunal en aurait ordonné la saisie ou la vente. Cet élément est important puisque, comme je l'ai mentionné précédemment, le législateur a modifié la *Loi sur les pêches* en 1991 pour supprimer la restriction selon laquelle seul le produit d'une vente effectuée en vertu de la *Loi sur les pêches* était susceptible de confiscation. Deuxièmement, la Cour d'appel n'a pas tenu compte de l'effet qu'aurait la condition préalable de rétention matérielle continue sur le processus par lequel un navire peut être restitué à son propriétaire sur dépôt d'une garantie en vertu du par. 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)

Le processus par lequel le dépôt d'une garantie permet la mainlevée de la saisie des biens en vertu du par. 71(2) de la *Loi sur les pêches* est un genre

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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.

de cautionnement. Cette disposition confère au tribunal le pouvoir discrétionnaire d'ordonner la restitution des biens au saisi si une garantie, que le ministre juge acceptable quant au montant et à la forme, est fournie à Sa Majesté. Il y a donc formation d'un contrat entre la Couronne et la personne qui demande la restitution des biens, par lequel cette dernière donne en gage à la Couronne un objet de valeur, généralement un montant d'argent égal ou supérieur à la valeur marchande des biens saisis, pour garantir l'exécution de l'obligation principale. Cette entente profite aux deux parties parce que le saisi peut récupérer les biens et les utiliser à bon escient et que la Couronne n'a pas à engager des dépenses pour leur garde et leur entretien. De cette manière, les deux parties, de même que les créanciers, sont protégés contre la diminution de valeur résultant de l'accumulation des frais de garde au cours de la rétention des biens. Il existe donc des raisons valables et impérieuses d'interpréter cette loi de façon à harmoniser les droits de l'accusé, de la Couronne, des employés et des créanciers, qui ont intérêt à obtenir la remise en circulation des biens productifs qui génèrent des revenus. Compte tenu de la possibilité d'une longue période de rétention avant le procès, la restitution des biens sur fourniture d'une garantie comporte d'importants avantages et il ne faut pas décourager le recours à ce processus.

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.

47

Toutefois, pour les motifs qui suivent, il serait moins intéressant de recourir à ce processus si une ordonnance de confiscation était assujettie à une condition préalable de rétention matérielle continue. La Loi ne semble pas conférer le pouvoir d'ordonner la confiscation d'un dépôt de garantie; seul le navire ou les autres biens contre lesquels la garantie est échangée peuvent être confisqués. Le droit de réclamer le dépôt de garantie est contractuel et découle de l'inexécution des obligations qu'a contractées le saisi lors de la restitution des biens. Il devrait être loisible aux parties de prévoir dans un tel contrat l'obligation de restituer le navire si celui-ci fait l'objet d'une ordonnance de confiscation. Rien dans la Loi ne fait ressortir l'intention d'empêcher les parties de stipuler ce genre de clause.

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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.

De plus, si la rétention matérielle continue était une condition préalable au prononcé d'une ordonnance de confiscation, il faudrait, pour que cette peine puisse être appliquée, que la Couronne refuse le dépôt de garantie ou que le tribunal exerce son pouvoir discrétionnaire et refuse d'ordonner la restitution des biens. Rien dans la *Loi sur les pêches* n'indique que la mesure provisoire et interlocutoire que constitue la restitution des biens sur dépôt d'une garantie devrait écarter ou rendre inapplicable la réparation de la confiscation. Une telle interprétation est incompatible avec les avantages mutuels que comporte ce processus, l'harmonisation des droits des parties et des tiers innocents, l'intention du législateur d'accroître la sévérité et la souplesse des peines prévues par la *Loi sur les pêches* et l'effet dissuasif du pouvoir de confiscation. Après avoir pris tous ces éléments en considération, j'estime que le par. 72(1) prévoit le prononcé d'une ordonnance de confiscation contre un navire ayant fait l'objet d'une mainlevée de saisie et restitué sur dépôt d'une garantie. En outre, l'autorisation de confisquer « tout objet saisi » accordée par le par. 72(1) vise les objets qui ont été saisis antérieurement en vertu de la *Loi sur les pêches*, mais qui ont fait l'objet d'une mainlevée.

c) *Le recours en cas de confiscation*

En outre, la Cour d'appel n'a pas examiné les répercussions de l'art. 75 de la *Loi sur les pêches*. L'article 75 permet aux parties innocentes détenant un droit sur des biens de solliciter auprès de la cour supérieure d'une province une ordonnance déclarant que la confiscation ne porte pas atteinte à leurs droits et précisant l'étendue de ceux-ci. Une partie innocente peut faire valoir son droit sur le navire sous la forme d'une demande *in rem* présentée devant la Cour fédérale, exerçant alors sa compétence en matière d'amirauté. Malgré l'argument de l'intimée selon lequel les tribunaux de Terre-Neuve ont conservé intacte leur compétence en matière d'amirauté, une telle procédure est normale, surtout dans les ressorts où la compétence des cours supérieures en matière d'amirauté a été cédée à la Cour fédérale du Canada. Il serait d'ailleurs abusif d'obliger la partie faisant valoir un droit réel sur un navire saisi à attendre la délivrance d'une ordonnance de confiscation en appli-

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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*

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.

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

cation de la *Loi sur les pêches* pour qu'un tribunal compétent en matière d'amirauté détermine l'étendue de son droit. Par conséquent, il ressort clairement de l'art. 75 que la *Loi sur les pêches* prévoit la possibilité d'instances parallèles, *in personam* et *in rem*, touchant le même navire. Cette conclusion renforce l'opinion que le par. 72(1) autorise la confiscation du produit de la vente obtenu en vertu d'un autre texte législatif que la *Loi sur les pêches*.

d) *L'harmonisation des lois*

50 Comme je l'ai mentionné précédemment, en raison de l'interaction entre la compétence *in personam* dont la Cour suprême de Terre-Neuve est investie en application de la *Loi sur les pêches* et de la compétence *in rem* en matière d'amirauté que la *Loi sur la Cour fédérale* confère à la Cour fédérale, il est important d'appliquer en l'espèce les principes d'harmonisation des lois dans le cadre de l'examen du « contexte global » du par. 72(1) et de l'intention du législateur.

51 On peut et on doit interpréter les dispositions de la *Loi sur la Cour fédérale* en matière d'amirauté et les dispositions de la *Loi sur les pêches* comme des régimes cohérents et harmonieux de réglementation des questions maritimes. Les bateaux de pêche et leur utilisation sont au cœur des activités que régit chacun de ces systèmes, et les dispositions de l'un influenceront inévitablement les dispositions de l'autre. Par exemple, il est probable que de nombreux bateaux de pêche sont grevés d'une hypothèque et qu'ils doivent être exploités et générer des revenus pour permettre le remboursement de l'emprunt hypothécaire. La saisie d'un tel navire en application de la *Loi sur les pêches* peut donner lieu à une longue rétention avant le procès. Si le propriétaire est incapable d'obtenir la restitution du navire en fournissant une garantie, il est vraisemblable qu'une période de rétention empêchant son utilisation dans l'océan et faisant obstacle à ses activités lucratives entraîne une poursuite civile contre le navire devant un tribunal compétent en matière d'amirauté comme la Cour fédérale du Canada. Les modifications apportées en 1991 au par. 72(1) s'expliquent donc raisonnablement et manifestement de la façon suivante : le législateur a anticipé ce scénario et, afin de préserver la com-

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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.

V. 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,

pétence des tribunaux d'imposer la confiscation comme peine, il a élargi le pouvoir d'ordonner la confiscation au produit de la vente d'un navire saisi effectuée en vertu d'un texte législatif autre que la *Loi sur les pêches*, donnant ainsi effet à l'intention du législateur d'augmenter les peines reliées aux infractions en matière de pêche tout en protégeant l'application de la présomption d'innocence à l'égard de la procédure quasi pénale de la *Loi sur les pêches*.

Si on adoptait l'interprétation restrictive qu'a donnée la Cour d'appel au par. 72(1), une ordonnance de vente de la Cour fédérale mettrait fin au pouvoir de la Cour suprême de Terre-Neuve d'ordonner la confiscation. En ce qui a trait à l'interaction entre la *Loi sur les pêches* et la compétence en matière d'amirauté prévue dans la *Loi sur la Cour fédérale*, un tel résultat n'est pas conforme au principe d'interprétation qui présume l'harmonie, la cohérence et l'uniformité entre les lois traitant du même sujet.

V. Conclusion

Compte tenu des différentes questions en cause dans le présent pourvoi, des questions de compétence qu'elles soulèvent et de la conciliation des compétences *in rem* et *in personam*, criminelle et commerciale, maritime et pénale, ainsi que de la compétence de la Cour fédérale et du tribunal provincial, je conclus que le par. 72(1) autorise le tribunal chargé de la détermination de la peine à rendre une ordonnance de confiscation du produit de l'aliénation d'un navire saisi à l'origine en application de la *Loi sur les pêches*, mais vendu dans l'exercice de la compétence de la Cour fédérale du Canada. La *Loi sur les pêches* prévoyait la vente du navire, mais ce n'est pas en application de cette loi que la vente a été effectuée. En outre, la Couronne n'a pas introduit d'instance en Cour fédérale dans la présente affaire, et sa demande d'intervention et sa requête visant l'obtention d'une ordonnance de vente ne visaient pas à contourner les restrictions de la *Loi sur les pêches*.

Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi, d'annuler l'ordonnance de

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and restore the order of forfeiture made by the sentencing judge.

Appeal allowed.

Solicitor for the appellant: The Deputy Attorney General of Canada, Ottawa.

Solicitors for the respondent: Lewis, Sinnott, Shorthall & Hurley, St. John's.

la Cour d'appel et de rétablir l'ordonnance de confiscation qu'a rendue le juge chargé de la détermination de la peine.

Pourvoi accueilli.

Procureur de l'appelante : Le sous-procureur général du Canada, Ottawa.

Procureurs de l'intimée : Lewis, Sinnott, Shorthall & Hurley, St. John's.

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Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd., [2016] B.C.J. No. 2269, 2016 BCCA 432

Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd., [2016] B.C.J. No. 2269

British Columbia and Yukon Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

D.M. Smith, G. Dickson and G.J. Fitch JJ.A.

Heard: August 17 and 18, 2016.

Judgment: November 3, 2016.

Dockets: CA43548, CA43549

[2016] B.C.J. No. 2269 | 2016 BCCA 432 | 271 A.C.W.S. (3d) 644 | 53 M.P.L.R. (5th) 175 | 91 C.P.C. (7th) 229 | 2016 CarswellBC 3040 | 90 B.C.L.R. (5th) 29 | 404 D.L.R. (4th) 106 | 6 C.E.L.R. (4th) 18 | [2017] 5 W.W.R. 144

BetweenCowichan Valley Regional District, Respondent/Appellanton Cross Appeal(Petitioner), andCobble Hill Holdings Ltd., South IslandAggregates Ltd. and South IslandResource Management Ltd., Appellants/Respondentson Cross Appeal(Respondents)

(96 paras.)

Case Summary

Municipal law — Planning and development — Zoning regulations — Land use — Appeal by quarry owners from decision declaring that appellants' Landfill Facility, Soil Treatment Facility and importing contaminated soil for permanent encapsulation in engineered cells to backfill quarry were not permitted land uses under Zoning Bylaw and granting injunctions restraining appellants from engaging in these activities allowed in part — Cross-appeal by respondent District from refusal to order removal of facilities or product already on site dismissed — Landfill Facility fell under Mines Act and thus within provincial jurisdiction — Activities of Soil Treatment Facility did not fall under mining activity and thus fell under respondent's jurisdiction.

Natural resources law — Mines and minerals — Environmental impact — Reclamation, remediation, rehabilitation and restoration — Re-contouring pit walls and waste dumps — Appeal by quarry owners from decision declaring that appellants' Landfill Facility, Soil Treatment Facility and importing contaminated soil for permanent encapsulation in engineered cells to backfill quarry were not permitted land uses under Zoning Bylaw and granting injunctions restraining appellants from engaging in these activities allowed in part — Cross-appeal by respondent District from refusal to order removal of facilities or product already on site dismissed — Landfill Facility fell under Mines Act and thus within provincial jurisdiction — Activities of Soil Treatment Facility did not fall under mining activity and thus fell under respondent's jurisdiction.

Appeal by Cobble Hill from a decision granting in part a petition by the respondent District declaring that the appellant's Landfill Facility, Soil Treatment Facility and importing contaminated soil for permanent encapsulation in engineered cells were not permitted land uses under the Zoning Bylaw and granting injunctions restraining the appellants from engaging in these activities. Cross-appeal by the respondent from the judge's refusal to order the removal of the facilities or the product already on site, including the deposited encapsulated cells. The appellants operated a rock quarry. Pursuant to permits obtained by them under the Mines Act and the Environmental Management Act, the appellants were authorized to import contaminated soil to backfill the quarry cavity. The

Environmental Management Act permit also authorized them to construct an on-site Landfill Facility for backfilling the quarry and an on-site Soil Treatment Facility for treating the contaminated imported soil. The respondent argued that the quarry operation contravened the permitted uses of land under the Local Government Act. The appellants submitted that the quarry was a mine, that the Province had exclusive jurisdiction under the Mines Act for site reclamation of a mine, and that the backfilling of a quarry was integral to site reclamation. The judge concluded that the appellants' site reclamation was a landfill as these activities were not integral, necessary, core or ancillary to their excavation or extraction activities and were therefore subject to land use regulation by the respondent.

HELD: Appeal allowed in part.

Cross-appeal dismissed. The Province had exclusive jurisdiction to regulate the operation of a quarry and its site reclamation, provided the reclamation activity was integral to restoring the affected landform. The quarry site reclamation was not a landfill. The Landfill Facility was authorized under the Mines Act for site reclamation of the excavated quarry land. It had no resemblance to a municipal waste dump. Both the excavation of the quarry and its Landfill Facility were a use of the land that fell within the respective definitions of "mine" and "mining activity" under the Mines Act. Site reclamation, which included the restoration of the excavated land, was also a use of land that fell within the definition of "mine" and "mining activity". The activities of the Soil Treatment Facility did not fall with the reclamation of a "mine" or "mining activity" under the Mines Act as they were not integral to the restoration of the landform. The bioremediation of the contaminated soil was a processing activity that, to date, had been carried on off-site. Its activities were conducted on the surface of the land, separate from the mine. Even if it was more operationally prudent, more energy efficient and more environmentally sustainable to process the imported soil on-site to backfill the quarry, local government jurisdiction was engaged and must authorize the operation. If the Province wanted to regulate on-site processing of soil imported from off-site for reclamation purposes, it must amend the Mines Act.

Statutes, Regulations and Rules Cited:

Environment Management Act, S.B.C. 2003, c.á5, s. 1, s. 14, s. 14(1)

Local Government Act, S.B.C. 2016, c.á1, s. 327, s. 479

Mines Act, R.S.B.C. 1996, c.á293, s. 1, s. 10

Municipal Act, S.B.C. 1957, c.42,

Court Summary:

The appellants are owners of fee-simple land on which they operate a rock quarry pursuant to a mine permit issued under the Mines Act. The quarry cavity was initially backfilled with "clean" soil. The appellants subsequently obtained an amended permit under the Mines Act and a permit under the Environmental Management Act to import contaminated soil that was permanently encapsulated in engineered synthetic-lined cells for the backfilling of the quarry cavity where it is capped with a meter of clay and two meters of soil. The EMA permit also authorized an alternative facility that would permit the appellants to undertake bioremediation of the imported contaminated soil on site. The alternative facility was not included in the amended mine permit and, while constructed, has not been put into operation. The CVRD appealed the EMA permit to the Environmental Appeal Board. The appeal was dismissed. The CVRD then pursued the underlying petition in which it applied for declaratory and injunctive relief against the appellants on the basis that their operation contravened the permitted

uses of land under the Local Government Act. The judge agreed and granted the relief requested. However he dismissed the CVRD's application for mandatory injunctions to remove the contaminated soil already backfilled and the bioremediation facility. On appeal, the appellants submitted that the quarry is a mine, that the Province has exclusive jurisdiction under the Mines Act for site reclamation of a mine, and that the backfilling of a quarry is integral to site reclamation. The CVRD contended that a quarry is not a mine, that only the extraction of the aggregate falls within the exclusive jurisdiction of the Province, and that all other non-extraction activities including site reclamation is subject to local government land use regulation. Held: Appeal allowed in part. Cross appeal is dismissed. Under the Mines Act, a quarry is a mine and its site reclamation, which includes the backfilling of the quarry cavity, is a mining activity. The bioremediation of the imported soil on site is not integral to site reclamation and is subject to local government land use regulation.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated March 21, 2016 (*Cowichan Valley (Reginal District) v. Cobble Hill Holdings Ltd.*, *2016 BCSC 489*, Victoria Docket No. 13-3547).

Counsel

Counsel for the Appellants, Cobble Hill Holdings Ltd., and South Island Aggregates Ltd.: L.J. Alexander, A. Faulkner-Killam.

Counsel for the Appellant, South Island Resource Management Ltd.: K.R. Doerksen, J. Lee.

Counsel for the Respondent: A. Bradley.

[Editor's note: Corrections were released by the Court November 7, 2016; the changes have been made to the text and the corrections are appended to this document.]

[Supplementary reasons for judgment were released May 8, 2017. See [2017 B.C.J. No. 856.]

Reasons for Judgment

The judgment of the Court was delivered by

D.M. SMITH J.A.

Overview

1 The excavation of a rock quarry and its site reclamation are at the center of this longstanding dispute. Excavation is the extraction of aggregate from a landform, which typically leaves the landform with a cavity or pit. Reclamation is the restoration of the affected landform to its pre-quarry state by backfilling the cavity with soil. Soil includes sand, gravel or rock.

2 Reclamation is an integral part of quarrying. An approved site reclamation plan is required under s. 10 of the *Mines Act, R.S.B.C. 1996, c. 293* before the Ministry of Energy and Mines (the "MoM) will issue a quarry permit.

Reclamation plans that raise environmental concerns also require a permit from the Ministry of the Environment (the "MoE") under s. 14 of the *Environment Management Act, S.B.C. 2003, c. 53* (the "*EMA*").

3 The Province has jurisdiction over mining. Using this permitting process, it regulates the extraction of aggregate and site reclamation.

4 The appellants submit the Province has exclusive jurisdiction over mining, which includes quarries. They say it is the sole regulator of quarries and any related on-site activities for the duration of the mine's operation. The respondent submits that other than extraction of the aggregate, all other non-extraction quarry activities, including site reclamation, are a use of land that is subject to local government regulation under the general zoning power in the *Local Government Act, S.B.C. 2016, c. 1*, (the "*LGA"*). The respondent contends the provincial jurisdiction over mining does not override local government's jurisdiction over land use where each jurisdiction is acting within its respective powers.

5 The parties' dispute was triggered when the Province granted the appellants a permit to import contaminated soil onto the quarry site to backfill the quarry cavity.

6 Although multiple issues were raised in the appeal and cross appeal, the central issue in my respectful view is one of jurisdiction. For the reasons below, I am of the view that the Province has exclusive jurisdiction to regulate the operation of a quarry and its site reclamation, provided the reclamation activity is integral to restoring the affected landform.

Background

7 Cobble Hill Holdings Ltd. ("CHH") is the fee-simple owner of a parcel of land south of Shawingan Lake. The land is situated in the Cowichan Valley and the Shawingan Lake watershed on Vancouver Island. On the western slope of the land a quarry excavation cuts into the hill. Surface water flows down the hill, through the excavation and into an ephemeral stream on the neighbouring property, which is also owned by the appellants.

8 South Island Aggregates Ltd. ("SIA") began to operate the rock quarry in 2006. In 2015, South Island Resource Management Ltd. ("SIRM") took over the quarry operation. SIRM is the current operator. I shall refer to these entities collectively as the "appellants."

9 The respondent, Cowichan Valley Regional District (the "CVRD"), is the local government with zoning authority in the area. In 1986, pursuant to the provisions of the *LGA*, the CVRD adopted the Electoral Area "B" Zoning Bylaw No. 985 -- Shawnigan Lake (the "Zoning Bylaw").

10 The Chief Inspector of Mines (the "Chief Inspector") issues permits under the *Mines Act* for mining and quarry operations. The permit includes requirements to reclaim the landform to its "pre-mining state". It also includes a requirement for a level of land productivity at the end of the operation. The Chief Inspector decides if the quarry has been successfully reclaimed at the end of its life.

11 In 2006, the quarry land was zoned for residential use. At that time, the quarry permit authorized the appellants to reclaim the site by importing "clean" soil (albeit all soil contains some contaminants) and restoring the landform to the pre-quarry residential land use.

12 In 2007, the quarry land zoning was changed to F-1 (primary forestry) and industrial uses including excavation, milling and crushing. This was in keeping with the CVRD's Official Community Plan that lists mining as one of its principle objectives. The zoning change allowed the appellants to change the nature of the soil they imported. Under the forest/industrial zoning industrial IL soil (also "clean" soil) could be imported onto the site without a permit. The zoning change also reduced the minimum lot size to 80 hectares beyond the size for residential subdivision.

13 In 2009, the quarry permit was amended. The amendment authorized the site to be reclaimed with imported soil that met MoE Soil Guidelines for backfilling the quarry and, if the MoE required one, a waste management permit before the soil was brought onto the land.

14 In 2011, the appellants applied to the MoE to further amend the quarry permit to allow them to import contaminated soil and associated ash (non-hazardous). They also requested a waste discharge permit to construct an on-site facility for backfilling the quarry (the "Landfill Facility") and an on-site facility for treating the contaminated soil (the "Soil Treatment Facility"). In addition, they applied to upgrade the existing water treatment system and settling pond for the increased discharge of effluent.

15 In August 2013, the MoE granted the permit. The MoE permit (i) requires the imported soil to meet MoE Soil Guidelines for the intended "end land use" (forestry/industrial) when the quarry activities are completed, and (ii) authorizes the management and processing of the contaminated soil by one of two ways: the Landfill Facility or the Soil Treatment Facility. Both are subject to stringent environmental requirements, monitoring and inspections.

16 The Landfill Facility stores contaminated soil in engineered, synthetic-lined cells, that are "permanently encapsulated" in the cavity of the quarry, where they are capped with a meter of clay and two meters of residential-grade soil. No associated ash has been included with the soil to date.

17 The Soil Treatment Facility is a rectangular, asphalt-paved pad (approximately 1,800 square meters) for the bioremediation of the soil to be deposited into the quarry cavity. Bioremediation is a natural waste management technique that uses the naturally occurring processes of organisms to remove, break down or neutralize the concentrations of organic contaminants through biodegradation. The facility has been constructed but has not been put into operation.

18 The MoE permit contemplates monitoring the site reclamation process for the life of the mine, estimated at between 40-50 years. At the completion of the quarry activities, the permit requires the land surface and watercourses to be reclaimed to a forestry/industrial land use (the end land use) and the surface level of the land restored to its prior 3% (flat) slope.

19 After the MoE permit was granted, the MoM amended the quarry permit to provide for the mandatory requirements of the MoE permit. It authorized the Landfill Facility but did not include the Soil Treatment Facility as a requirement for reclamation.

20 The CVRD has acknowledged the need to treat and manage contaminated soil in the Province. However, along with some of its residents, it has continuing concerns about the appellants' modified reclamation plan.

21 In October 2013, the CVRD commenced the underlying petition. In the petition, it claimed that the Landfill Facility and the Soil Treatment Facility were not permitted land uses under the Zoning Bylaw and it requested a number of declaratory and injunctive orders, effectively to prohibit the appellants from continuing the modified on-site reclamation process. It also filed an appeal of the MoE permit with the Environmental Appeal Board (the "EAB"), where it obtained a stay of the MoE permit pending the EAB decision. The appellants successfully applied to vary the stay order, permitting them to complete four of their soil deposit contracts.

22 The EAB hearing occurred over 31 days in March and July 2014. During the hearing, the CVRD raised a number of health and safety concerns about the impact of the modified reclamation process on the environment generally and on the Shawnigan Lake watershed in particular. The CVRD claimed the contaminants would enter the environment and threaten the drinking water and fish habitat. It also claimed the design of the Landfill Facility would not overcome those risks.

23 The EAB found otherwise. It accepted the evidence of the MoE experts, the mine inspectors and other experts who had been brought in to challenge the MoE position that the appellants' operation would not impair the

environment or the watershed. The EAB also found that it would be speculative to commit to monitoring the Landfill Facility after the quarry was abandoned in 40 to 50 years, as that decision would be dependent on the results of ongoing monitoring over the life of the quarry. In March 2015, the EAB dismissed the appeal in comprehensive written reasons.

24 The CVRD then resurrected its petition and proceeded with a 10-day hearing before Mr. Justice MacKenzie.

Relevant legislative provisions

25 The following legislative provisions are relevant to the issues raised in this appeal.

The Mines Act

26 The *Mines Act* provides the following definition of a "mine" and a "mining activity":

> **Definitions**
>
> **1** In this Act:
>
> **"mine"** includes
>
> (a) a place where mechanical disturbance of the ground or any excavation is made to explore for or to produce coal, mineral bearing substances, placer minerals, rock, limestone, earth, clay, sand or gravel,
>
> (b) all cleared areas, machinery and equipment for use in servicing a mine or for use in connection with a mine and buildings other than bunkhouses, cook houses and related residential facilities,
>
> (c) all activities including exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation,
>
> (d) closed and abandoned mines, and
>
> (e) a place designated by the chief inspector as a mine;
>
> **"mining activity"** means any activity related to
>
> (a) the exploration and development of a
>
> mineral, coal, sand, gravel or rock, or
>
> (b) the production of a mineral, a placer mineral, coal, sand, gravel or rock,
>
> and includes the reclamation of a mine;
>
> [Emphasis added.]

27 A mine therefore includes the excavation of sand, gravel or rock and its site reclamation.

28 A mine permit may be issued under s. 10 of the *Mines Act* only if the applicant has first obtained an approved reclamation plan:

> **10**(1) Before starting any work in, on or about a mine, the owner, agent, manager or any other person must hold a permit issued by the chief inspector and, as part of the application for the permit, there must be filed with an inspector a plan outlining the details of the proposed work and a program for ... the protection and reclamation of the land ... affected by the mine ...
>
> (2.01) Without limiting subsection (1.1) or (2), terms and conditions imposed under those subsections may include terms and conditions respecting any or all of the following;

...

(d) environmental protection and reclamation.

[Emphasis added.]

The LGA

29 In the *Municipal Act*, S.B.C. 1957, c.42, "land" was defined as:

> "Land" means the soil or ground without improvements, and includes land covered by water, and all quarries and substances in or under the land other than mines or minerals. [Emphasis added.]

30 The *Municipal Act Amendment Act,* S.B.C. 1959, c. 56, changed the definition of "land" to its current wording in the *LGA.* The *LGA* incorporated the definition of "land" from the *Community Charter*, S.B.C., 2003, c.26 (the "*CC*"), which no longer includes quarries:

> **Definitions**
>
> **"land"**
>
> (a) for the purposes of assessment and taxation, means land as defined in the Assessment Act, and (b) for other purposes, includes the surface of water, but does not include
>
> (i) improvements
>
> (ii) mines or minerals belonging to the Crown, or
>
> (iii) mines or minerals for which title in fee simple has been registered in the land title office;

31 The 1959 *Municipal Act Amendment Act* also added the local government zoning power to its jurisdiction. The general zoning power is now found in s. 479 (formerly s. 903) of the *LGA.* It may only be exercised in relation to "land" as defined by the *LGA.* Section 479(1) provides:

> **Zoning bylaws**
>
> **479**(1) A local government may, by bylaw, do one or more of the following:
>
> ...
>
> (c) regulate within a zone
>
> (i) the use of land, buildings and structures
>
> ...
>
> (3) The power to regulate under subsection (1) includes the power to prohibit any use or uses in a zone.

32 Section 327 (formerly s. 723) of the *LGA* sets out the authority for a regional district to regulate or prohibit a service in relation to the deposit and removal of soil:

> **Removal and deposit of sand, gravel and other soil**
>
> **327**(1) This section applies to a regional district only if the regional district provides a service in relation to the control of the deposit and removal of soil and the control and deposit of other materials.
>
> (2) The board may, by bylaw, regulate or prohibit
>
> (a) the removal of soil from, and
>
> (b) the deposit of soil or other material on any land in the regional district or in any area of the regional district.

...

(4) Section 9 [spheres of concurrent authority with the *LGA*] of the *Community Charter* applies to a provision in a bylaw under subsection 2 that

(a) prohibits the removal of soil, or

(b) prohibits the deposit of soil or other material and that makes reference to quality of soil or material or to contamination.

[Emphasis added.]

33 The CVRD does not provide a service for the deposit of soil and does not have a soil deposit bylaw.

34 Sections 8 and 9 of the *CC,* which are incorporated into the *LGA,* provide:

Fundamental Powers

8(3) A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:

...

(m) the removal of soil and the deposit of soil or other material.

Spheres of concurrent authority

9(1) This section applies in relation to the following:

(e) bylaws under section 8 (3) (m) *[removal and deposit of soil and other material]* that

(i) prohibit soil removal, or

(ii) prohibit the deposit of soil or other material, making reference to quality of the soil or material or to contamination.

(2) For certainty, this section does not apply to

(a) a bylaw under section 8 that is under a provision not referred to in subsection (1) or is in respect of a matter to which subsection (1) does not apply,

(b) a bylaw that is authorized under a provision of this Act other than section 8, or

(c) a bylaw that is authorized under another Act, even if the bylaw could have been made under an authority to which this section does apply.

(3) Recognizing the Provincial interest in matters dealt with by bylaws referred to in subsection (1), a council may not adopt a bylaw to which this section applies unless the bylaw is

(a) in accordance with a regulation under subsection (4),

(b) in accordance with an agreement under subsection (5), or

(c) approved by the minister responsible.

[Emphasis added.]

35 Section 4.2 of the Zoning Bylaw provides that land may only be used as specifically permitted:

4.2 Land or the surface of water shall not be used and structures shall not be constructed, altered, located or used except as specifically permitted by this bylaw.

36 Section 4.4 of the Zoning Bylaw also permits uses accessory to the permitted principal use in the F-1 zone. It provides:

> **4.4** Except where otherwise specifically stated all uses permitted by the bylaw include those uses accessory to the permitted principle uses and all buildings or structures include all buildings or structures reasonably auxiliary to buildings and structures constructed located or used with respect to permitted principal uses.
>
> [Emphasis added.]

"Accessory" is defined as "ancillary or subordinate to a principal use".

"Principal" with respect to a use is defined as "primary and chief".

37 The permitted land uses are listed in s. 7.4(a) of the Zoning Bylaw. Only the listed uses "and no others" are permitted. They include:

> **7.4 F-1 - Primary Forestry**
>
> (a) Permitted uses
>
> The following uses and no others are permitted in an F-1 zone:
>
> (1) The management and harvesting of primary forest products excluding sawmilling and all manufacturing and dry land log sorting operations;
>
> (2) Extraction crushing milling concentration for shipment of mineral resources or aggregate materials excluding all manufacturing;
>
> (3) Single family residential dwelling or mobile home;
>
> (4) Agriculture silviculture horticulture;
>
> (5) Home based business;
>
> (6) Bed and breakfast accommodation;
>
> (7) Secondary suite or small suite on parcels that are less than 10.0 hectares in area;
>
> (8) Secondary suite or a second single family dwelling on parcels that are 10.0 hectares or more in area.
>
> [Emphasis added.]

38 Section 5.20 of the Zoning Bylaw deals with contaminated soil and waste. It provides:

> **5.20 Contaminated Soil and Waste**
>
> Unless explicitly permitted in a zone, no parcel shall be used for the purpose of storing contaminated waste or contaminated soil, if the contaminated material did not originate on the same legal parcel of land that it is being stored on.

39 The CVRD has not received approval for this bylaw from the minister responsible.

The EMA Act

40 The Code does not define "land" or "land use". However, s. 1 of the *EMA* defines "land" as "the solid part of the earth's surface including the foreshore and land covered by water".

41 The introduction of waste into the environment requires a permit under the *EMA.* Section 14 mandates:

14(1) A director may issue a permit authorizing the introduction of waste into the environment subject to requirements for the protection of the environment that the director considers advisable and, without limiting that power, may do one or more of the following in the permit:

(a) require the permittee to repair, alter, remove, improve or add to works or to construct new works and to submit plans and specifications for works specified in the permit;

(b) require the permittee to give security in the amount and form and subject to conditions the director specifies;

(c) require the permittee to monitor, in the manner specified by the director, the waste the method of handling, treating, transporting, discharging and storing the waste and the places and things that the director considers will be affected by the discharge of the waste or the handling, treatment, transportation or storage of the waste;

(d) require the permittee to conduct studies and to report information specified by the director in the manner specified by the director;

(e) specify procedures for monitoring and analysis, and procedures or requirements respecting the handling, treatment transportation, discharge or storage of the waste that the permittee must fulfill;

(f) require the permittee to recycle certain wastes and to recover certain reusable resources, including energy potential from wastes.

42 The EAB imposed conditions in the MoE permit under most of the categories listed in s. 14(1)(a)--(f).

The Judgment

43 Before MacKenzie J., the appellants submitted that (i) the Province has exclusive jurisdiction to regulate all activities associated with reclaiming a quarry because a quarry is a "mine" and (ii) site reclamation is a "mining activity" as defined under the *Mines Act.* They argued that the CVRD's jurisdiction to regulate their use of the land will only be re-engaged when the quarrying activities, including reclamation, are complete. In the alternative, they submitted that reclamation is an integral, necessary and core aspect of "extraction", which is a permitted land use under s. 7.4(a)(ii) of the Zoning Bylaw, and is also an "ancillary use" to the permitted principal use of "extraction" under s. 4.4 of the Zoning Bylaw.

44 The CVRD contended that it has the jurisdiction to regulate the appellants' deposit and placement of reclamation soil under its general zoning power in s. 479 of the Zoning Bylaw. It argued that (i) the appellants' reclamation activities are effectively a landfill, and that a landfill is a use of land subject to regulation by the CVRD; (ii) all of the appellants' non-extraction activities, which include associated or related "mining activities, are not excluded from the definition of "land" in s. 1 of the *LGA,* based on the interpretation of "land" in the *LGA* in *Squamish (District) v. Great Pacific Pumice Inc. et al.,2003 BCCA 404* [*Pumice*] and are prohibited as they do not fall within the permitted uses in s. 7.4(a)(ii) of the Zoning Bylaw; and (iii) based on *Pumice,* the storage and processing of materials approved under a provincial permit can be regulated or prohibited by the local government's general zoning power, absent the use of the land being expressly permitted under s. 7.4(a).

45 The judge agreed with the CVRD. He concluded that the appellants' reclamation activities are not integral, necessary, core or ancillary to their excavation or extraction activities and are therefore subject to land use regulation by the CVRD. In particular, he held:

(1) Based on *Vernon (City) v. Okanagan Excavating (1993) Ltd.(1995), 9 B.C.L.R. (3d) 331* (C.A.), the extraction of aggregate is a *profit à prendre* (a right to take something from the land) and therefore is not subject to local government land use regulation; however based on *Pumice,* all other "non-extraction" activities are subject to zoning regulation:

[79] ... there is no issue local governments do not have the authority to regulate extraction of aggregate material (see [*Vernon*]).The CVRD submits however, that while extraction of a mineral or aggregate material is not a land use, all other "related activities" are land uses and subject to zoning, citing [*Pumice*], and that a mining permit does not trump local government zoning. That is, the CVRD says all "non-extraction components" are subject to zoning bylaws.

[Emphasis added.]

(2) While "extraction" is a permitted land use under s. 7.4(a)(ii) of the Zoning Bylaw, reclamation is not; nor is it an "integral", "core", or "necessary" activity to the extraction activity (accepting the opinion of the CVRD's expert that the appellants' reclamation activities were not "necessary" or "normal" for a small quarry):

[86] In my view, it is only activities that are integral to extraction of the resource that can escape local land use regulation. Moreover, I am unable to agree that reclamation is an integral and necessary aspect of the actual extraction process, such that a local government is precluded from exercising its zoning power to restrict reclamation activities. In my view, to accede to the submission advanced by the [appellants] would be contrary to the general principles enunciated in both *Great Pacific Pumice* and *Vernon.*

...

[90] The CVRD's intention or purpose in passing the bylaw was to permit the extraction of resources, including other specific mining activities. However, in my view, this does not mean the petitioner intended to relinquish its jurisdiction to control what land use activities occur on land where a resource is being extracted, as long as any land use restriction does not interfere with or prohibit extraction of the resource. I cannot agree with the [appellants] when they say that if I interpret extraction to exclude reclamation, they could not extract the aggregate and this would mean the CVRD did not intend to allow mining. As the Court of Appeal outlined in *Neilson v. Langley (Township),[1982] B.C.J. No. 2313*, at para. 18, the interpretation of municipal bylaws should be done with a view to giving effect to the intention of the municipal council. I am satisfied the intent of the CVRD is clearly to permit extraction and the specified processing activities, at the same time enforcing the zoning bylaw.

[91] In my view, even though there must be a reclamation plan in order to obtain a mining permit, reclamation is not a "core" or integral mining activity that escapes local zoning regulations. It is different than extraction of the mineral or aggregate. As a result, I am satisfied that the [CVRD] has jurisdiction to regulate non-extraction mining activities, including reclamation activities.

[92] For the same reasons, I am unable to agree with the [appellants'] other argument that any activity [emphasis in original] that might be considered reclamation is a principal permitted use. While this bylaw specifically permits other mining activities, I am satisfied that even if the importation and encapsulation of this material could be considered reclamation, as this activity is not integral to the extraction of the aggregate, it cannot be considered a permitted land use under s. 7.4 of the zoning bylaw.

[Emphasis added.]

(3) The site reclamation was not an "accessory use" to the authorized principle "extraction" activity:

[96] ... I am satisfied the purpose broadly served by the F-1 zone is to allow for the extraction of minerals and aggregate, as well as crushing, milling and concentration for shipment, and that the purpose of s. 4.4 is to allow uses that are ancillary, or necessary, to the actual permitted uses, that is, activities that are required in order to extract the aggregate and get it to the marketplace. As a result, I am unable to agree with the [appellants] that the activities taking place on the property are "accessory" to extraction, crushing or milling, such that they can be considered a permitted accessory use.

[Emphasis added.]

(4) The reclamation process of permanent encapsulation of waste soil in engineered cells for deposit into the cavity of the quarry is a landfill and therefore subject to the Zoning Bylaw, which does not expressly permit the land to be used as a landfill:

> [113] ... I also agree with the CVRD that whether the respondents are operating a landfill or reclaiming the quarry depends on the context of the activity and what is actually occurring on site. While I give due weight to the opinions of both experts, having regard to the totality of the evidence, I am satisfied the [CVRD] has established that the permanent encapsulation of waste soil in the engineered cells has, in fact, created a landfill that is properly characterized as a land use, and is subject to the zoning bylaw. Moreover, I am satisfied a landfill is not a permitted use, either under the "implied exclusion approach" and the operation of s. 4.2 and s. 7.4 of the zoning bylaw, or pursuant to the test of statutory interpretation as outlined in *Paldi* [*Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District)*, *2014 BCCA 335*].
>
> [Emphasis added.]

(5) There is no operational conflict between the activities of the appellants under the quarry permit issued pursuant to s. 10 of the *Mines Act,* and the CVRD's prohibition of their site reclamation activities under the Zoning Bylaw pursuant to the *LGA*, if the appellants restrict their reclamation activities to only those land uses permitted by the CVRD:

> [89] I am unable to accept that such a conflict exists. In my view, these enactments are capable of existing together harmoniously as an integrated regulatory scheme pertaining to land use and mining legislation. The CVRD is not attempting to prohibit reclamation activities; it simply seeks to restrict them to comply with permitted land uses under zoning bylaw. As for the MoE permit, it gives permission to the respondents to import waste and permanently encapsulate it if they so desire. The permit in no way compels [emphasis in original] the respondents to do anything, nor does the zoning bylaw prohibit in any way extraction of the aggregate material (see *Greater Vancouver (Regional District) v. Darvonda Nurseries Ltd.,2008 BCSC 1251*). I conclude the regulations can co-exist.

(6) In light of his conclusion that the "landfilling of imported waste on the property is not a permitted principle or accessory land use", it was unnecessary to decide what the judge referred to as the appellants' alternative submission, namely that s. 5.20 (which prohibits the storage of contaminated soil), was a valid and enforceable provision of the Zoning Bylaw. He observed in *obiter*:

> [117] What was somewhat inconsistent, however, was the [appellants] then went on to submit that adding soil to the land "is the deposit of soil, which whether worded as storage or otherwise, cannot be controlled without a s. 723 bylaw, and cannot be controlled as to quality without ministerial approval."
>
> [118] Be that as it may, it was only if the petitioner was unsuccessful on its primary argument would it be necessary to consider the [appellants] 'alternative' argument that s. 5.20 is *ultra vires* the CVRD's power to zone land uses, on the basis that, if a local government wishes to control the quality of soil being deposited on land, contaminated or not, that power is found in s. 723 of the *LGA* (as it then was), not pursuant to the land use power in s. 903, and that without ministerial approval, local governments cannot pass any provision that refers to the quality of soil.

46 In the result, the judge found that the appellants' site reclamation was a landfill that was subject to land use regulation under the CVRD's general zoning power. As it was not an expressly permitted use under s. 7.4(a), the site reclamation activities were prohibited. He granted the CVRD's request for declaratory orders that the Landfill Facility, Soil Treatment Facility and importing contaminated soil for permanent encapsulation in engineered cells were not permitted land uses under the Zoning Bylaw, as well as injunctions restraining the appellants from engaging in each of those activities.

47 The judge declined to order a mandatory injunction for the removal of the facilities or the "product" already on site, including the deposited encapsulated cells, relying on the expertise of the MoE and EAB as to the safety of the "product". He also declined to order a mandatory injunction for the removal of the concrete lock blocks in the soil management area and the upgraded water treatment system, which he found "can be a legitimate and important

use within the parameters of extraction and the other permitted mining activities of crushing and milling" under s. 7.4(a)(ii) of the Zoning Bylaw 9 at para. 125.

48 The appellants appeal the judge's declaratory and injunction orders. The respondent cross appeals the orders dismissing its applications for mandatory injunctions.

Issues

49 The appellants raise several issues on appeal. They submit the judge:

(a) erred in law by concluding that a regional district has legislative authority to regulate mines and mandatory mine activities that take place within them (paras. 86 and 91);

(b) erred in law by concluding that a regional district can, by virtue of general land use or "zoning power", control or regulate the deposit of soil, particularly with reference to quality (paras. 117 and 118). They say the judge misconstrued the issue as applicable only to the appellants' alternative arguments, failed to apply the statutory scheme, and ignored applicable authority that a bylaw, which in effect, regulates soil deposit, (at least with respect to quality) absent appropriate ministerial approval, is not enforceable;

(c) erred in interpreting the purpose of the Zoning Bylaw (at paras. 90 and 92) and in concluding that the reclamation activity constitutes a "landfill" that the CVRD intended the Zoning Bylaw to prohibit (para. 113); and

(d) erred in concluding that only uses accessory to extraction, and not to mining, are permitted under accessory use (para. 96).

50 In the cross appeal, the CVRD submits the judge erred in not ordering the appellants to remove the Landfill Facility, the Soil Treatment Facility, and waste materials from the site when he found they were in breach of the Zoning Bylaw. In those circumstances, it submits, "the public interest is at stake in the enforcement of a zoning bylaw", citing *Langley (Township) v. Wood,*1999 BCCA 260 at para. 17.

On Appeal

51 I propose first to address the judge's finding that the appellants' site reclamation is a landfill, which, if the judge were correct, would determine the appeal. The operation of a landfill is a land use that is subject to local government zoning. A quarry permit under the *Mines Act* does not authorize a landfill.

A. Is the quarry site reclamation a landfill?

52 The quarry site reclamation is not a landfill. The finding that the appellants are operating a landfill appears to have been derived principally from the language in the EAB decision. In its reasons, the EAB refers to the initial quarry permit under the *Mines Act* as the "mine permit" and defines the MoE permit as "the Permit".

53 The EAB report noted that the MoE permit applies to "the discharge of refuse from a contaminated soil treatment and to the landfill facility". It described the authorized works as "a landfill, engineered lined landfill cells ..." and the context of this "landfill" as the deposit of the imported soil contained in these engineered lined cells into the cavity of the quarry. It stated: "'Landfilling' in this case does not mean that contaminated soils are simply deposited into the quarry; rather, the soil will be encapsulated in engineered cells." It also used the term "landfill" interchangeably with "backfill" and "reclamation" to describe depositing the soil into the excavated land. This was in contrast to its description of the "discharge" of liquid effluent, or "emission" of air contaminants. In short, the purpose of the soil deposit was clear; it was always meant to backfill the quarry pit.

54 There is no evidence that the Landfill Facility was intended to create a landfill *per se,* as that term is generally

understood, namely a municipal waste dump where all types of refuse are deposited. The MoE permit authorizing the Landfill Facility is governed by the *EMA,* which includes 47 regulations. The *EMA* regime regulates the discharge of environmental "waste", including waste streams from air emissions, liquid effluent streams, and soil deposits. The *EMA* also defines "municipal solid waste" as "refuse that originates from residential, commercial, institutional, demolition, land clearing or construction sources" or "refuse specified by a director to be included in a waste management plan". Municipal solid waste does not include soil.

55 The Landfill Facility was authorized under the *Mines Act* for site reclamation of the excavated quarry land. It bears no resemblance to a municipal waste dump.

56 In my opinion, it was factually incorrect for the judge to characterize the appellants' reclamation activities as a landfill. Such a characterization ignored the context of the *EMA* regime in approving and regulating the construction and operation of the Landfill Facility.

B. Is a quarry a "mine" and its reclamation a "mining activity" under the *Mines Act?*

57 A quarry is a mine and its site reclamation is a mining activity.

58 Historically, quarries were included in the definition of "land" in the 1957 *Municipal Act.* The 1959 *Municipal Act Amendment Act* changed the definition of "land" by deleting any reference to quarries.

59 The appellants submit the quarry and its site reclamation fall within the definition of a "mine" and a "mining activity", respectively, under the *Mines Act.* The CVRD contends a quarry is not a mine as it does not fall within the "mines" exclusions in the definition of land in the *LGA,* and that its non-extraction activities fall within the definition of "land" based on the historical meaning of the "mines" exclusion in the *LGA,* as interpreted in *Pumice.*

60 The modern approach to statutory interpretation is 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" (*Sullivan on the Construction of Statutes,* 6th ed. (Toronto: Lexis Nexis, 2014 at p. 1). As well, *Sullivan* at p. 421, citing *Canada (Attorney General) v. Public Service Alliance of Canada,*[*[1991] 1 S.C.R. 614*] at paras. 23 and 25, instructs that statutes which deal with the same subject:

> ... are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject ... The provisions of each are read in the context of the others and consideration is given to whether they are part of a single scheme. The presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single act.

61 The modern approach to statutory interpretation also requires that the words of a legislative provision be interpreted in a manner that takes into account their context. See *Peachland (District) v. Peachland Self Storage Ltd.,*[*2013 BCCA 273*] at para. 19; and *R. v. Summers,*[*2014 SCC 26*] at para. 55.

62 In my view, both the excavation of the quarry and its Landfill Facility are a use of the land that falls squarely within the respective definitions of "mine" and "mining activity" under the *Mines Act*: a "'mine' includes a place where mechanical disturbance of the ground or any excavation is made to explore for ... rock ...and site reclamation"; and "'mining activity' means any activity related to the reclamation of a mine." The use of land refers to the use of the surface of the land. It is the disturbance of the surface of the land for the excavation of rock that is, by definition, a "mine" and a "mining activity".

63 Site reclamation, which includes the restoration of the excavated land, is also a use of land that falls within the definition of "mine" and "mining activity". Reclaiming land to its pre-mining state refers to restoration of the surface of the land, in this case to the forest/industrial use. The permit refers to the restoration of the surface of the land to a certain level of productivity consistent with its pre-mining state.

64 It is clear from these provisions that reclamation is an integral part of the unified regulatory regime for the oversight of mining in the Province. In short, excavation of a quarry and its site reclamation are simply two sides of the same coin.

C. Does the Province have exclusive jurisdiction over the regulation of mines and their related site reclamation activities?

65 Mines and mining activities include depositing soil for site reclamation. The movement of soil is regulated under a comprehensive regime developed by experts, administered by statutory decision makers, and subject to specialized administrative tribunal appeal.

66 The Province's interest in mining is significant. That is evident by the extensive requirements that must be met before a MoM permit and, where required, a MoE permit, are issued.

67 The Legislature clearly intended to ensure that the Province's jurisdiction over the regulation of mines and mining activities is maintained because of the importance of mining to the provincial economy. That intention is apparent in the following legislative provisions: (i) the express exclusion of "mines" in the definition of land in the *CC*; (ii) the express recognition of the provincial interest in mining in s. 9(1) of the *CC,* adopted in the *LGA,* that requires a council to obtain the approval of the minister responsible before a bylaw prohibiting the deposit of contaminated soil will be enforceable; and (iii) related legislative provisions and statutes that reserve control of mines and mining activities to the Province to ensure a unified provincial regulatory scheme, including the following: *Health, Safety and Reclamation Code,* Part 10 (reclamation standards) [the "Code"]; *Building Act,* S.B.C. 2015, c. 2, s. 2(b); *Contaminated Sites Regulation,* Part 1 (the definition of "soil") and Part 6, *Metalliferous Mines Regulation Act,* R.S.B.C. 1948, c. 218, s. 2 (the definition of "mine"); *Land Act, R.S.B.C. 1996, c. 245, s. 19* (quarrying land); *Mineral Tenure Act,* R.S.B.C. 1996, c. 292, s. 1 (definition of "mineral"); and *Mines Fee Regulation,* (definition of "mineral or coal mine", and "pit or quarry").

68 The CVRD contends the "mines" exclusions in the *LGA* definition of "land" is limited to only those mines or minerals that were historically registered in the land titles office separately from the land. It relies on the comments in *Pumice,* which I shall discuss below, to support this position. However, regardless of whether "mines" in the definition of "land" in the *LGA* refers to its historical meaning as "substances on or under the surface" that are capable of severance from the surface as a separate tenement (as found in *Pumice*), or extends to its modern and broader meaning that is captured by the definitions in the *Mines Act,* it is clear that the Legislature intended to exclude some forms of mines and mining activities from the definition of "land" in the *LGA.*

69 That intention is also apparent in the legislative requirement for provincial oversight of bylaws for the removal and deposit of soil. Section 9(3) of the *CC,* which is incorporated into the *LGA,* expressly requires the approval of the minister responsible in order for a soil deposit bylaw to be enforceable. This is expressly stated for the purpose of "[r]ecognizing the Provincial interest in matters dealt with by bylaws ..." that "prohibit soil removal or ... prohibit the deposit of soil or other matter, making reference to quality of the soil or material or to contamination."

70 The CVRD does not provide a service for controlling soil deposits and removals. Nor does it have a soil deposit bylaw issued under s. 327 of the *LGA*; it has been unable to obtain provincial approval for such a bylaw. The CVRD cannot regulate or prohibit a specific use of land under its general zoning power in s. 479 of the *LGA,* which requires bylaws to be passed to regulate or prohibit a specific land use within a zone. The CVRD can only regulate the use of land if (i) the land to be regulated falls within the definition of "land" in s. 1 of the *LGA,* and (ii) if the use of land is one that is expressly permitted under s. 7.4(a)(ii) of the Zoning Bylaw as that provision authorizes "no others". In the absence of a soil deposit bylaw, the CVRD cannot regulate or prohibit the deposit of soil on the appellants' land.

71 The CVRD submits that it has the authority to prohibit the deposit of contaminated soil on the appellants' land under s. 5.20 of the Zoning Bylaw. Section 5.20 prohibits storing contaminated soil if the soil does not originate on

the same land. The CVRD attempted to distinguish this provision by its use of the word "storage" rather than "deposit" to circumvent the requirements of s. 327. In my respectful view, this is a distinction without a difference. Storing soil that does not originate on the same land requires the soil to be deposited on site. In short, s. 5.20 is a soil deposit bylaw that in my view is unenforceable, absent provincial approval.

72 In the alternative, the CVRD submits that because s. 5.20 was passed in 2004 it is not subject to the requirement for ministerial approval. However, the requirement for ministerial approval under the *CC* came into effect on January 1, 2004 and therefore s. 5.20 would have been subject to ministerial approval to be enforceable when it was passed. In any event, ss. 723(4) and (4.1) of the *LGA* were also in effect on January 1, 2004 and those sections require ministerial approval for any bylaws that prohibit the removal or deposit of soil, or that reference the quality or contamination of soil.

73 The necessity of provincial approval for an enforceable soil removal bylaw was confirmed in *Vernon.* There, the Court held that the local government did not have the authority to regulate the removal of soil (including sand, gravel and rock) from the land in the absence of ministerial approval of a bylaw prohibiting its removal. Subsequent to this decision, the bylaw was amended to include the requirement for ministerial approval of a bylaw for "the deposit of soil or other matter, making reference to quality of soil or material or to contamination."

74 In my opinion, the CVRD has not demonstrated a legislative intention that would authorize it to regulate or prohibit the deposit of soil on the appellants' property pursuant to (i) the general zoning power under s. 479 of the *LGA*, (ii) the specific requirements for a soil deposit bylaw under s. 327 of the *LGA*, or (iii) under s. 5.20 of the Zoning Bylaw.

75 In these circumstances there is no operational conflict between the *Mines Act* and the *LGA.*

Pumice

76 I turn then to *Pumice.* The circumstances in *Pumice* involved an off-site storage and processing facility for the mineral pumice. The mining of the mineral took place some 65 kms away. In that context, the Court held that those activities (storing and processing the pumice) did not fall within the "mines" exclusion for the definition of "land" in s. 1 of the *LGA.* This was based on an interpretation of the word "mine" in the exclusion of "land" in the *LGA* as being the "excavation o[f] substances on or under the surface" (at para. 49), and that did not include "all mining activities on the surface of land" (at para. 48) [emphasis added]. In those circumstances, the Court held that the off-site land on which the pumice was stored and processed was subject to municipal land use regulation.

77 The Court also recognized the significance of "the mining regime" from the *Mines Act* and the Code:

> [41] ...The *Mines Act* and the regulations promulgated under it constitute a code that governs the development of a mine from exploration until closure or abandonment, designed to protect people's health and safety, the environment, and cultural resources, and to ensure reclamation.
>
> ...
>
> [43] Under the *Mineral Act*, ... and its successors up to and including the *Mineral Tenure Act* ... the Legislature has provided security of tenure of minerals to the mining industry...With that mineral lease comes not only the right to extract the minerals, but also the afore-mentioned surface rights and the controls in the *Mines Act, supra*, and the Health, Safety and Reclamation Code for Mines in British Columbia, 1997.
>
> [44] The mining industry is also subject to the *Mineral Tax Act*, *R.S.B.C. 1996, c. 291*, the *Mining Right of Way Act*, *R.S.B.C. 1996, c. 294*, the *Canadian Environmental Protection Act,* 1999, *S.C. 1999, c. 33*, the *Heritage Conservation Act*, *R.S.B.C. 1996, c. 187*, and the *Waste Management Act, R.S.B.C. 1996, c. 482*. The respondent and the intervenors see great harm and no good in being subject as well to the municipal zoning power in the exercise of their surface rights to access their minerals.

[Emphasis added.]

78 In the result, the Court decided that the mining regime does not "trump" the local government regime, as was argued by Great Pacific Pumice Inc., where the impugned activities involved off-site storage and processing of a mined mineral. In those circumstances, the Court concluded that a piece of land, not designated by the Province as a mine, did not fall within the exclusive jurisdiction of the Province simply because it was being used for a purpose tangentially related to mining.

79 To appreciate the reasoning in *Pumice,* it is necessary to review the submissions of the parties in that case. The respondents had argued that all mining activities, both on-site and off-site, even if they were unrelated to reclamation of the affected land, were subject to exclusive provincial regulation, as mining legislation "trumps" municipal legislation. In the course of addressing this submission, the Court undertook a review of the historical evolution of the relevant municipal legislation, including the *Municipal Act,* R.S.B.C 1936, c. 199, and the 1957 *Municipal Act*. The former Act had defined "land" as "the ground or soil and everything annexed to it by nature, or that is in or under the soil (except mines and minerals, precious or base, belonging to the Crown), and shall include the interest of a person in land held under timber lease or timber licence from the Crown in the right of the Dominion." The latter Act had defined "land" as the "soil or ground without improvements," and it included "land covered by water, and all quarries and substances in or under the land other than mines or minerals." The 1959 *Municipal Act Amendment Act* removed quarries from the definition of "land". In 1989, the *Mines Act* was first enacted and it included a definition of "mine" that would appear to include a quarry. At para. 27 the Court observed:

> [27] This understanding of the phrase "mines or minerals" is also consistent with the definition of mine in the *Mineral Act*, 1896, c. 34, s. 2, to which reference was made in the *Land Registry Act Amendment Act, 1905, supra*:
>
> > "Mine" shall mean any land in which any vein or lode, or rock in place, shall be mined for gold or other minerals, precious or base, except coal:
>
> If this remains the meaning of "mines or minerals," [i.e. the excavation of substances in or under the ground] the exemption [in the *LGA*] cannot apply to the respondent's Squamish facility [the off-site storage and processing of pumice].

80 The Court concluded:

> [48] In concluding the Legislature did not intend to broaden the meaning of "mines" [in the exclusions of "mines" in the definition of "land" in the *LGA*] so as to include all mining activities on the surface of the land, I have not forgotten that "every enactment must be construed as always speaking" and that the vernacular use of the word "mines" in the 21st century in British Columbia is broader than its vernacular meaning in the 19th century in the United Kingdom.

81 The focus of these comments then was to clarify the meaning of the exclusion of mines in the definition of "land" in the *LGA.* It did not include an analysis of the definition of "mine" or "mining activity" in the *Mines Act.* With respect to the *Mines Act,* the Court observed generally:

> [39] In the exercise of its responsibility to the citizens of British Columbia generally, the Legislature has enacted a comprehensive regime governing the mining industry's use of publically owned minerals. It is not a resource allocation or land use scheme.
>
> ...
>
> [41] Over the years, those historic rights have been increasingly regulated. Section 5 of the *Ministry of Energy and Mines Act, R.S.B.C. 1996, c. 298*, empowers the Minister "to regulate all mining activity" and section 4 provides that his duties, powers and functions "extend to and include all matters relating to energy, mineral resources and petroleum resources." The *Mines Act* and the regulations promulgated under it constitute a code that governs the development of a mine from exploration until closure or

> abandonment, designed to protect people's health and safety, the environment, and cultural resources, and to ensure reclamation.

82 *Pumice* did not address the issue before us, namely whether a quarry and its site reclamation are captured by the definition of mine and mining activity in the *Mines Act.* If a quarry and its site reclamation are captured by the definition, then in my opinion, they are subject to the exclusive jurisdiction of the Province.

83 The CVRD contends that, based on the comments in *Pumice,* any surface area on which a quarry or mine operates falls within the definition of "land" in the *LGA,* and is subject to ss. 4.2 and 7.4(a)(ii) of the Zoning Bylaw, which expressly permits only "extraction" of the aggregate. The CVRD maintains that as none of the appellants' non-extraction activities are expressly permitted under s. 7.4(a)(ii), those activities can be prohibited pursuant to the general provisions of the Zoning Bylaw or s. 5.20. With respect, I cannot agree.

84 The ratio of *Pumice* is that off-site storage and processing activities are not site reclamation. I agree. Reclamation is the restoration of that part of the landform affected by excavation. Off-site mining activities do not meet that purpose. Both the excavation of the land and its reclamation must take place on-site. It was in this context that the Court held a "mine" was "confined to an excavation of substances on or under the surface" (at para. 49) and did not include "all mining activities on the surface of land" (at para. 48) [emphasis added]. The Court did not find that site reclamation was not a "mine" or "mining activity" under the *Mines Act.*

85 The oft-quoted passage in *Quinn v. Leathan,*[1901] A.C. 495 (H.L.) is apposite in these circumstances:

> ...there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides.
>
> [Emphasis added.]

86 The CVRD's submission that the land cannot be returned to its pre-mining state if the engineered capsules remained buried beneath the surface incorrectly narrows the meaning of "pre-mining state". Reclamation does not require the land to be returned to the exact condition it was in before the amended quarry permit was issued. The MoM permit requires the surface of the land to be restored to a level of productivity after the operation is complete consistent with the forestry/industrial end land use. Ultimately, however, it is the decision of the Chief Inspector as to whether the appellants have successfully reclaimed the quarry.

87 The CVRD accepted the appellants' jurisdiction to reclaim the quarry land with "clean" soil. SIRM operates the quarry under an integrated mining and environmental permitting process that has continued since the quarry began in 2006 and, until 2013, with the CVRD's concurrence. Only when the nature of the soil was changed did the CVRD challenge the Province's jurisdiction to reclaim the quarry land in this manner.

88 In my view, it is clear that the Province has exclusive jurisdiction over the regulation of quarries/mines and their related site reclamation activities.

D. The soil treatment facility

89 As previously stated, reclamation is the process of restoring the surface of the mined land to the landform that existed before the mining permit was granted. It continues until the mining activities are complete, after which the local government's jurisdiction over the use of the surface of the land is re-engaged. The Landfill Facility involves depositing soil to backfill the quarry cavity. The objective of this facility is to restore the excavated landform.

90 It is not clear to me that the same can be said of the Soil Treatment Facility. It seems to me, that the purpose of

the Soil Treatment Facility is independent of, and not integral to, restoring the landform. Currently, however, managing and treating the soil is done off-site and then the soil is imported onto the appellants' property.

91 The issue is whether the activities of the Soil Treatment Facility fall within the reclamation of a "mine" or "mining activity" under the *Mines Act.* In my view they do not. They are not integral to the restoration of the landform.

92 The bioremediation of the contaminated soil is a processing activity that, to date, has been carried on off-site. Its activities are conducted on the surface of the land, separate from the mine. In this context, it is similar to *Pumice* as well as *Cowichan Valley (Regional District) v. Lund Small Holdings Ltd.,* (09 November 2000) Victoria 00/2934 (B.C.S.C.), where the on-site treatment of imported contaminated soil was enjoined. To be clear, it is the use of the land to process off-site materials, not the construction of the physical facility, that is subject to local government regulation. When the quarry activities are complete, the Soil Treatment Facility will have to be dismantled just like any other of the remaining mining apparatuses used in the excavation.

93 In sum, even if it may be more operationally prudent, more energy efficient and more environmentally sustainable to process the imported soil on-site to backfill the quarry, local government jurisdiction is engaged and must authorize the operation. If the Province wants to regulate on-site processing of soil imported from off-site for reclamation purposes, it must amend the *Mines Act.*

94 In these circumstances, I agree with the judge that the Soil Treatment Facility is subject to the CVRD land use jurisdiction. As it is not a permitted use of the land under s. 7.4(ii) of the Zoning Bylaw, its operation, not the physical structure which may have other uses, is enjoined.

E. Disposition

95 The Province has exclusive jurisdiction over mines, which include quarries, and site reclamation. The Landfill Facility reclaims the appellants' quarry. The Soil Treatment Facility does not.

96 In the result, the appeal is allowed, save and except for the order enjoining the appellants from operating the Soil Treatment Facility. The cross appeal is dismissed.

D.M. SMITH J.A. G. DICKSON J.A.

D.M. SMITH J.A.
I agree.
I agree.

* * * * *

CORRECTIONS

Released: November 7, 2016

On the title page and headers of the reasons for judgment released November 3, 2016, the name of the judgment is corrected to read "Cowichan Valley (Regional District)" rather than "(Reginal District)".

At the third sentence of para. 4: "... are a use of land that are subject to ... " is changed to "... are a use of land that is subject to ... ".

At the first sentence of para. 91: "The issue is whether the activities of the Soil Treatment Facility fall with "... is

changed to "The issue is whether the activities of the Soil Treatment Facility fall within ...".

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