

Tab 13



Huus et al. v. Superintendent of Pensions et al.

[Indexed as: Huus v. Ontario (Superintendent of Pensions)]

58 O.R. (3d) 380
[2002] O.J. No. 524
Docket Nos. C35896 and C35919

Court of Appeal for Ontario
Abella, Feldman and MacPherson JJ.A.
February 14, 2002

Pensions -- Transfer of pension assets -- Winding up of pension plan -- Standard of review of decision of Superintendent of Pensions -- Employer applying to Superintendent of Pensions for consent to transfer assets to consolidated pension plan -- Employees simultaneously applying to Superintendent for winding up of pension plan and distribution of accumulated surplus -- Superintendent's failure to consider partial wind-up request before or in conjunction with deciding transfer application making consent to transfer unreasonable -- Consent set aside -- Assets to be returned to employees' pension plan -- Pension Benefits Act, R.S.O. 1990, c. P.8, s. 81.

W Corp., a manufacturer of pulp and paper products in Ontario, Nova Scotia and Quebec, was a corporation within the BTR group. In 1995, the respondents, who were members of the Pension Advisory Committee for retired salaried members, learned of BTR's plans to consolidate the pension plans of all its affiliated corporations in Canada and the United States, and they wrote to the Superintendent of Pensions asking that their pension plan be wound up. Their letter noted that the company had not contributed to the pension plan for about 20 years, and they submitted that the plan surplus should benefit those who primarily contributed to it. In 1996, the respondents

wrote the Superintendent informing him that W Corp. had announced that it would close its plant in Ontario, and they asked for a partial winding up of the W Corp. pension plan under s. 69 of the Pension Benefits Act ("PBA"). Meanwhile, on December 30, 1996, W Corp. applied to the Superintendent to obtain consent to the transfer of the pension assets into a consolidated BTR plan.

Under s. 81(5) of the PBA, the Superintendent must withhold consent to a transfer that does not protect the pension benefits of the members and former members of the pension plan. On August 15, 1997, the Superintendent approved the transfer of assets of \$14,661,282, which included a surplus of \$4,216,300. In June 1998, the respondents applied for judicial review of the Superintendent's decision approving the transfer.

In a decision dated May 30, 2000, the Divisional Court set aside the Superintendent's consent and ordered the return of the assets of the W Corp. plan. Furthermore, the court ordered that any new decision about the winding up of the W Corp. plan be referred to the Financial Services Tribunal. The court also awarded costs on a solicitor and client basis against the Superintendent and BTR fixed at \$54,294.06. The Superintendent, W Corp. and BTR appealed.

Held, the mandatory referral to the Financial Services Tribunal should be set aside; in all other respects, the appeal should be dismissed with costs.

The Superintendent's decision approving the transfer of assets was made pursuant to s. 81 of the PBA, and the standard of review of this decision was reasonableness simpliciter. Pension plans are for the benefit of the employees, not the companies that create the plans, and the Superintendent owed a high duty to the employees. The record established that the Superintendent focused almost exclusively on W Corp.'s transfer application and ignored almost entirely the retirees' request pursuant to s. 69 of the PBA for a wind-up or partial wind-up of the pension plan with a view to the distribution of the accumulated surplus. The Superintendent appears never to have made a formal decision about the wind-up request and it was

unclear whether he ever seriously considered it. The Superintendent's failure to consider the wind-up request before or in conjunction with deciding the transfer application made his consent to the transfer unreasonable. On the remedial issue, the analysis of the Divisional Court was correct. The Divisional Court, however, erred in making any future decision of the Superintendent subject to a referral to the Financial Services Tribunal, regardless of whether any party requested a hearing. Finally, there was no basis for interfering with the costs order. Although solicitor and client costs should be awarded only in exceptional cases, this was such a case. Accordingly, the mandatory referral to the Financial Services Tribunal should be set aside and, in all other respects, the appeal should be dismissed with costs.

Cases referred to

Collins and Pension Commission of Ontario, Re (1986), 56 O.R. (2d) 274, 16 O.A.C. 24, 31 D.L.R. (4th) 86, 21 Admin. L.R. 186, 33 B.L.R. 265 (Div. Ct.); Firestone Canada Inc. v. Ontario (Pension Commission) (1990), 1 O.R. (3d) 122, 42 O.A.C. 176, 78 D.L.R. (4th) 52, 33 C.C.E.L. 225 (C.A.); Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, 158 D.L.R. (4th) 497, 37 C.C.E.L. (2d) 69 (C.A.); Hinds v. Superintendent of Pensions, unreported, February 14, 2002 (Ont. C.A.); Schmidt v. Air Products of Canada Ltd., [1994] 2 S.C.R. 611, 20 Alta. L.R. (3d) 225, 115 D.L.R. (4th) 631, 168 N.R. 81, [1994] 8 W.W.R. 305, 4 C.C.E.L. (2d) 1, 3 E.T.R. (2d) 1 (sub nom. Stearns Catalytic Pension Plans, Re)

Statutes referred to

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 24, 68, 69, 80, 81, 89

APPEAL from an order of the Divisional Court on an application for judicial review of a decision of the Superintendent of Pensions under the Pension Benefits Act, R.S.O. 1990, c. P.8.

Steve Waller, for respondents.
Deborah McPhail, for appellant Superintendent of Pensions.
Bruce Pollock and Gary Nachshen, for appellants Weavexx
Corporation, BTR Inc. and BTR Canada Holdings Inc.

The judgment of the court was delivered by

MACPHERSON J.A.: --

A. Introduction

[1] When a company wants to transfer pension assets from an existing pension plan to a different pension plan, it must obtain the consent of the Superintendent of Pensions (the "Superintendent") [See Note 1 at end of document] to the transfer. The Superintendent must withhold consent to a transfer "that does not protect the pension benefits . . . of the members and former members of the original pension plan": see s. 81(5) of the Pension Benefits Act, R.S.O. 1990, c. P.8 (the "PBA").

[2] In the present case, a company proposed a transfer of pension assets into a consolidated plan with a view to harmonizing several pension plans operated by its affiliates in Canada and the United States. The company applied for consent to the transfer by the Superintendent.

[3] At about the same time, a Pension Advisory Committee (the "PAC") representing the retired salaried members of the existing pension plan took a different view of the transfer. Concerned that the transfer might remove their potential right to a distribution of the substantial surplus that had accumulated in the plan, the PAC applied to the Superintendent for a partial wind-up of the pension plan pursuant to s. 69 of the PBA.

[4] This appeal concerns how the Superintendent dealt with these two requests.

B. Facts

(1) The parties and the events

[5] The appellant, Weavexx Corporation ("Weavexx"), a Canadian corporation, is engaged in the manufacture and distribution of products used in the pulp and paper production process. At all times relevant to this litigation, Weavexx was a majority-owned subsidiary of the appellant BTR Canada Holdings Inc., which in turn was a Canadian affiliate of the appellant BTR Inc., a Delaware corporation (together, "BTR").

[6] Weavexx was formed by the amalgamation on October 1, 1992 of two companies in the BTR group, Hucyk Canada Inc. ("Hucyk") and Niagara Lockport Industries Ltd. ("Niagara Lockport"). At the material time, Weavexx had operations in Arnprior, Ontario and Kentville, Nova Scotia, formerly operated by Hucyk and in Warwick and Trois-Rivieres, Quebec, formerly operated by Niagara Lockport.

[7] The respondents, the members of the PAC [See Note 2 at end of document] for retired salaried employees which was established in 1990, wrote to the Pension Commission of Ontario [See Note 3 at end of document] in 1993 advising it that there had been substantial downsizing in the ranks of salaried employees at Weavexx.

[8] On October 26, 1995, the PAC, which had got wind of BTR's plan to consolidate the pension plans of all of its affiliates in Canada and the United States, wrote a letter to the Superintendent requesting that the Weavexx Pension Plan be wound up. The letter, signed by the respondent Eystein Huus, stated, inter alia:

We in the committee strongly believe that this plan now should be wound up. The main reason for this is the severe downsizing which has taken place during the last four years, including two "early retirement windows" -- one in early 1992, and one in 1994. The ratio of "Actual Members" to "Retirees" has dropped from 93/46 at the end of 1991 -- to 49/72 at the end of 1994. There has also been further

downsizing in 1995.

The plan has a very healthy surplus as shown in the enclosed "Report of Operations -- for Plan Year ended December 31, 1994". This in spite of the fact that the Company has not contributed to the plan for about 20 years. The surplus therefore comes from employee contributions, wise investments, and a nearly total lack of improvements to the plan. The latter can best be exemplified by the fact that there have been no improvements for the retirees in the last 20 years -- in spite of hefty inflation rates in several of those years!

Our committee believes that this surplus should primarily benefit those who have contributed to it, and who in many cases now live in dire circumstances -- rather than end up as an asset for a company which hasn't contributed to it for such a very long time! And for that reason we recommend the plan be wound up.

[9] Almost a year later, on October 7, 1996, Mr. Huus again wrote to the Superintendent, informing him that Weavexx had announced that it would close its plant in Arnprior in 1996. He continued: "All production has now ended, and the dismantling of the plant is well under way." On behalf of the PAC, he concluded by urging the Pension Commission to order a partial wind-up of the Weavexx pension plan.

[10] In the same 1995-1996 time frame, the appellants had been moving on an entirely different track. In September 1995, Weavexx notified its employees and retirees of BTR's intention to consolidate the pension plans of all its affiliates, including Weavexx. More than a year later, on December 30, 1996, Weavexx made a formal application to the Superintendent to transfer its pension assets into the consolidated BTR plan. The proposed effective date of the transfer was January 1, 1996 (almost a year earlier). The surplus in the Weavexx plan on January 1, 1996 was \$4,216,300.

[11] In considering the appellants' application for a transfer, the Superintendent was required to consider s. 81(5)

of the PBA, which provides:

81(5) The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the original pension plan or that does not meet the prescribed requirements and qualifications.

(Emphasis added)

[12] On August 15, 1997, the Superintendent approved the transfer of pension funds from the Weavexx plan to the BTR plan. The amount of the approved transfer was \$14,661,282. The Superintendent communicated his consent to the transfer to the appellants but not to the respondents.

[13] The Superintendent appears never to have made a formal decision concerning the respondents' request for a partial wind-up of the Weavexx pension plan.

(2) The litigation

[14] On June 30, 1998, the respondents brought an application for judicial review of the Superintendent's decision dated August 15, 1997 approving the transfer of the assets of the Weavexx pension plan to the consolidated BTR pension plan. In a decision dated May 30, 2000, the Divisional Court (Flinn, Jennings and Ferguson JJ.) set aside the Superintendent's consent and ordered the return of the assets to the Weavexx plan.

[15] In an addendum to the reasons for judgment dated November 16, 2000, dealing with the question of remedy, the court said that any new decision of the Superintendent dealing with the wind-up or partial wind-up of the Weavexx plan was to be referred to the Financial Services Tribunal (the "Tribunal"), the successor since 1997 of the Pension Commission.

[16] In the same addendum, the court awarded the applicants their costs on a solicitor and client basis against the

Superintendent and BTR fixed at \$54,294.06.

[17] The appellants appeal against all aspects of the decision of the Divisional Court -- i.e. the merits, the remedy and costs.

C. Issues

[18] The issues on the appeal are:

- (1) Did the Divisional Court err by setting aside the decision of the Superintendent dated August 15, 1997?
- (2) Did the Divisional Court err by ordering that the issue of wind-up or partial wind-up be determined by the Superintendent and reviewed by the Tribunal?
- (3) Did the Divisional Court err by awarding costs to the respondents on a solicitor and client basis payable by the Superintendent and BTR?

D. Analysis

- (1) The consent to transfer issue

- (a) General

[19] The appellants contend that the Divisional Court made several errors when it set aside the Superintendent's decision dated August 17, 1997 approving the transfer of pension assets from the Weavexx plan to the consolidated BTR plan. They submit that the Divisional Court erred by holding that the Superintendent exceeded his jurisdiction by failing to give adequate consideration to the trust provisions of the Weavexx plan and to the accrued surplus in the prior plan. The appellants also submit that the Divisional Court erred by holding that the Superintendent exceeded his jurisdiction by approving the transfer without taking account of a post-transfer development, namely, the closure some months later of the Arnprior plant. The appellants also contend that the Divisional Court erred by concluding that the Superintendent

did not accord the respondents their rights of procedural fairness. Finally, the appellants contend that the Divisional Court erred by concluding that BTR owed, and breached, a duty of procedural fairness to the appellants. In summary, the appellants contend that the Divisional Court erred in its interpretation of substantive pension law and erred in its analysis of the process issue.

[20] I do not think that the appellants have accurately characterized the decision of the Divisional Court. My reading of the decision is that the Divisional Court disposed of the application entirely on the process issue. It is true that the court referred to the substantive pension law issues, including the trust provisions of the Weavexx plan and the legal nature of a surplus. However, these references were made in the context of explaining the arguments the appellants wanted to make to the Superintendent. In my view, this is clear from the final two paragraphs of the court's reasons on the validity of the Superintendent's decision. The court stated its conclusion in this fashion:

Accordingly, the court concludes that the Superintendent exceeded his jurisdiction when he did not give adequate consideration to the question of wind-up and the trust provisions of the Weavexx plan with its surplus and further failed to observe their fiduciary duties to the applicants.

Without deciding how far the Superintendent had to go with respect to procedural fairness in dealing with the request of the applicants and a number of members of the pension plan of Weavexx, procedural fairness was not accorded to these members of the plan by either the Superintendent or BTR.

[21] I do not read this passage as representing a decision by the Divisional Court on the substantive pension law issues arising from the fiduciary duties of pension administrators, the interpretation of the trust provisions of the Weavexx pension plan or the legal nature of, and entitlement to, a pension plan surplus. Rather, the court is saying that because the PAC was not accorded procedural fairness, it was not able to argue, and the Superintendent did not therefore "give

adequate consideration to", those substantive issues. It goes without saying that if the PAC had been given the opportunity to advance these arguments, the Superintendent might well have decided them against the PAC.

(b) Standard of review

[22] Although the Divisional Court employed "excess of jurisdiction" language on occasion in its reasons for judgment, which might raise the spectre of a correctness standard of review, the court's reasons read as a whole make it clear that it was applying a reasonableness standard to its review of the merits of the Superintendent's decision. Indeed, the court stated this explicitly: "The court takes the view that the standard to be applied to the Superintendent should be that of reasonableness." The appellants agree that this is the appropriate standard, although they contend that the court actually applied the higher correctness standard. The respondents do not challenge the reasonableness standard.

[23] In *Hinds v. Superintendent of Pensions* [See Note 4 at end of document] ("*Hinds*"), this court held that the standard of review of a decision of the Superintendent made pursuant to s. 80 of the PBA is reasonableness simpliciter. Since s. 81(5) is identical to s. 80(5), the same standard should apply.

(c) Merits

[24] The Superintendent's decision approving the transfer of assets from the Weavexx pension plan to the consolidated BTR pension plan was made pursuant to s. 81 of the PBA. Section 81(5) of the PBA requires the Superintendent to refuse consent if the proposed transfer of assets "does not protect the pension benefits . . . of the members and former members of the original pension plan".

[25] I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees.

Indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension. As explained by Cory J. in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at p. 646, 115 D.L.R. (4th) 631:

In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour.

[26] Similar statements have been expressed by this court in several cases. In *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 39 O.R. (3d) 38, 158 D.L.R. (4th) 497 (C.A.), at p. 43 O.R., Robins J.A. said:

[T]he Pension Benefit Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans. . . .

[27] In *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122, 78 D.L.R. (4th) 52 (C.A.), at p. 127 O.R. ("Firestone"), Blair J.A. stated that the PBA "is clearly intended to benefit employees" and "[i]n particular . . . evinces a special solicitude for employees affected by plant closures". In the present case, it was the downsizing and then closure of the Arnprior plant which clearly played a role in the retirees' concern and in the employer's transfer application.

[28] The implication of these authorities is that the Superintendent owes a high duty to employees with Ontario pension plans. As for the nature and consequences of this duty, I would adopt, as I did in *Hinds*, the eloquent language used by Reid J. in *Re Collins and Pension Commission of Ontario* (1986), 56 O.R. (2d) 274, 31 D.L.R. (4th) 86 (Div. Ct.) ("Collins"), at p. 285 O.R.:

[I]t appears that the commission was established to ensure that certain interests were protected. While there is no doubt that those interests included the employer's, there appears to be equally no doubt that the commission was established to safeguard the plan members' interests as well . . . While the commission may not, strictly speaking, be a trustee for the members, for it holds no money belonging to the plan, it would be artificial to conclude that the commission's obligation to members is lower than the high standard of fiduciary obligation imposed on trustees.

[29] The chronology and contents of the record establish that the Superintendent focused almost exclusively on the employers' transfer application made pursuant to s. 81 of the PBA, but ignored almost entirely the retirees' request for a wind-up or partial wind-up of the pension plan with a view to a distribution to them of the surplus that had accumulated in the plan.

[30] Sections 80 and 81 of the PBA are the principal provisions dealing with transfers. Section 69 of the PBA relates to the winding-up of pension plans. It provides, inter alia:

69(1) The Superintendent by order may require the wind up of a pension plan in whole or in part if,

(a) there is a cessation or suspension of employer contributions to the pension fund;

.

(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer . . . ;

(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued. . . .

[31] All of these subsections were in play in the 1995-1997 period. The corporate appellants admitted that the employer made no contributions to the pension plan after 1983: see the affidavit of Emily Van Vleet, Director of Employee Benefits at BTR, para. 13. Thus s. 69(1)(a) of the PBA was a potential source for a wind-up order by the Superintendent. As well, throughout the early 1990s there was significant downsizing at Weavexx's Arnprior plant and it was closed in late 1996. Accordingly, s. 69(1)(d) and (e) were also potential bases for a wind-up order. [See Note 5 at end of document]

[32] Against the backdrop of the availability of both transfer and wind-up of the Weavexx pension plan, I turn to the chronology of events and the Superintendent's role and responses.

[33] The PAC moved first. It wrote to the Superintendent in 1993, alerting him to the substantial downsizing at the Arnprior plant. It wrote again on October 26, 1995 informing the Superintendent that it had been notified by BTR of its proposal to consolidate various pension plans, including the Weavexx plan. The PAC informed the Superintendent that they "strongly believe that this plan now should be wound up". The Superintendent acknowledged their letter on November 28, 1995 and said: "I would like to assure you that your representation on behalf of the Pension Advisory Committee will be taken into consideration when we review any application that is filed in respect of the proposed consolidation." On October 7, 1996, the PAC again wrote to the Pension Commission and requested that the Commission order a partial wind-up.

[34] The corporate appellants did not make their transfer application until December 30, 1996, more than a year after the first request by the PAC for a wind-up. The appropriate documents were sent to the Superintendent. However, the corporate appellants did not send them to the PAC until May 7, 1997, even though the subject matter of the application was employee and retiree pensions, there was a \$4,216,300 surplus in the plan, there was a PAC which had been established pursuant to s. 24 of the PBA, and the PAC had corresponded extensively with Weavexx and BTR about the proposed transfer

and consolidation.

[35] Because the PAC was having difficulty communicating with the Pension Commission, it contacted the area M.P.P., W. Leo Jordan, and asked for his assistance. The result was a letter from the Superintendent to Mr. Jordan dated June 11, 1997, stating, inter alia:

We have reviewed the reported annual membership for the above named pension plan and other related documents filed with the Pension Commission of Ontario for the periods between January 1, 1991 to December 31, 1995 and cannot establish any reason why the plan should have been wound up or even partially wound up at any time during the above described period.

We have also reviewed the documents filed for the plan consolidation (merger) effective January 1, 1996 and conclude that the consolidation meets the requirement of the Pension Benefits Act. . . .

A letter has been sent to the plan administrator [Ms. Van Vleet at BTR] requesting confirmation of the closure of the Arnprior Plant of Weavexx Corporation since a partial wind up may be warranted under subsection 69(1) of the Act. This would not have any effect on the consolidation . . . as the partial wind up of the plan would be subsequent to the consolidation of the plans. To date we have not received confirmation that a partial wind up is warranted.

[36] The timing and the contents of this letter are a cause of concern. On June 11, 1997, the Superintendent is informing an M.P.P. that a wind-up or partial wind-up based on downsizing is not warranted. This decision was not, however, formally communicated to the PAC which made the formal request for a wind-up. In the same letter, the Superintendent is informing an M.P.P. that the proposed consolidation complies with the PBA. This was not, however, communicated to the corporations which made the application until the Superintendent made his formal decision on August 15, 1997. Moreover, the decision made on that date was never communicated formally to the PAC, even though it was its members' pensions which lay at the heart of

the application and even though the PAC had corresponded extensively with the Superintendent about the proposed transfer and consolidation.

[37] The third paragraph of the Superintendent's letter (set out above) is also interesting. It refers to a letter that Steve Young, the Pension Officer with carriage of the file, had sent to Ms. Van Vleet on May 30, 1997 requesting information about the closure of the Arnprior plant. In the letter Mr. Young said:

If certain conditions are met, the Superintendent of Pensions may order the wind up of a pension plan, in whole or in part, pursuant to authority under section 69 of the Pension Benefits Act. . . .

Please provide us with the name and registration number of any pension plan in which employees affected by the above event [the plant closure] participated. Also advise us as to your company's intentions with respect to these pension plans and the affected members. If it is not your company's intention to voluntarily declare a wind up of the plan, either in whole or in part, we would ask that you provide us with details of the events affecting the members. The information is being requested to determine if any of the conditions under section 69 of the Act for the Superintendent to exercise his authority to order a wind up have been satisfied.

[38] Ms. Van Vleet responded to this letter on June 19, 1997. She indicated that Weavexx had initiated a full wind-up with respect to hourly employees. She said: "the Arnprior Hourly Plan is significantly overfunded with a surplus of \$2.9 million. We have approached the Union and are currently negotiating with them regarding a proposed distribution of that surplus." In other words, for the hourly workers, BTR was contemplating a wind-up, acknowledged a surplus, and was negotiating a distribution of the surplus with the members of that plan.

[39] With respect to the salaried employees, Ms. Van Vleet

communicated the following:

The closure also affected seven salaried employees who are participating in the BTR Pension Plan for Canadian Employees registration number 0559716. We do not intend to declare a formal partial windup of this plan in respect of the seven individuals involved, but we will grant these members full vesting and growth rights.

[40] It will be recalled that the surplus in the Weavexx pension plan for salaried employees was approximately \$4.2 million. There is nothing in Ms. Van Vleet's letter to explain why a surplus of \$2.9 million in the pension plan for hourly workers suggests a full wind-up, whereas a surplus of \$4.2 million in the pension plan for salaried workers does not suggest any kind of wind-up.

[41] The Superintendent made his formal decision approving the transfer application on August 15, 1997. There is nothing in that decision about the PAC's request for a wind-up or partial wind-up of the pension plan. The Superintendent's decision was not sent to the respondents.

[42] Based on this review, mostly chronological, of the major events, I share the Divisional Court's discomfort with the process adopted by the Superintendent in this case.

[43] On the transfer side of the equation, the Superintendent engaged in a review of the application and made a formal decision. However, I question whether this decision was anything more than a formality given that the Superintendent presaged his final decision in a letter to an M.P.P. two months before the formal decision.

[44] On the wind-up side of the equation, the Superintendent's performance was genuinely troubling. There was little and poor communication with the PAC, even though the PAC was established pursuant to s. 24 of the PBA and requested the Superintendent to consider a wind-up more than a year before the corporate appellants made their transfer application. The only substantive communication the Superintendent ever made

about the merits of the PAC's request was in a letter to the M.P.P. from the PAC's constituency. The Superintendent appears never to have made a formal decision about the wind-up request. Indeed, it is unclear whether the Superintendent was seriously considering the wind-up issue. Pension Officer Young's letter to Ms. Van Vleet at BTR on May 30, 1997 seems to suggest that he was:

The information is being requested to determine if any of the conditions under section 69 of the Act for the Superintendent to exercise his authority to order a wind-up have been satisfied.

However, in his letter to the M.P.P. just 11 days later, on June 11, 1997, the Superintendent stated that a partial wind-up would be subsequent to the consolidation and that "[t]o date, we have not received confirmation that a partial wind up is warranted", which seems to suggest that the Superintendent regarded his role on the wind-up issue as reactive -- and, indeed, reactive to the employer, not the requesting PAC.

[45] There was a good deal at stake in this merger/consolidation/wind-up matter. There was a surplus of more than \$4.2 million in a plan to which, on its own evidence, the employer had not contributed for 13 years previous to its consolidation application. I do not say that this is unlawful. Rather, I do say that the Superintendent ignored the PAC's request for a wind-up decision as he considered that application. Moreover, on the record, it is unclear how the Superintendent viewed the relationship between the employers' s. 81 transfer and consolidation application and the employees' s. 69 wind-up request. Finally, it appears that the Superintendent never made a decision on the employees' request. All of this was, in my view, starkly contrary to the observation of Blair J.A. in *Firestone*, supra, that the PBA "is clearly intended to benefit employees" and "[i]n particular . . . evinces a special solicitude for employees affected by plant closures". Accordingly, I think that the Divisional Court was correct to conclude that the Superintendent's decision of August 15, 1997 was unreasonable. The Superintendent's failure to consider the partial wind-up request prior to, or in

conjunction with, deciding the transfer application rendered unreasonable his consent to the transfer.

[46] Turning to a different issue, the Divisional Court also concluded that BTR had not accorded procedural fairness to the respondents. In my view, this conclusion is in error. The decision that is the subject matter of the application for judicial review and this appeal is the Superintendent's decision. BTR was the applicant, not the decision-maker. Hence it did not owe the respondents any duty of procedural fairness related to that decision.

(2) The remedy issue

[47] On the subject of remedy, the Divisional Court ordered that the consent of the Superintendent to the transfer of assets be set aside. The court also ordered that the pension assets be returned to the Weavexx plan. Finally, the court ordered the Superintendent to consider the wind-up issue. Any decision by the Superintendent (or failure to make a decision) would then be referred to the Tribunal. The appellants challenge the second and third components of this decision -- i.e. the return of the assets to the Weavexx plan and the compulsory role of the Tribunal in the resolution of the wind-up issue.

[48] On the return of the assets issue, the appellants contend that the Divisional Court only had jurisdiction to quash the Superintendent's consent to the transfer; it did not have the authority to take the additional step of returning the assets to the Weavexx plan. Specifically, the appellants contend that the Divisional Court's order breached s. 81(6) of the PBA:

81(6) The Superintendent by order may require the transferee to return to the pension fund assets . . . transferred without the prior consent of the Superintendent . . .

According to the appellants, this provision requires that the Superintendent, not the Divisional Court, decide whether the

pension assets should be returned to the Weavexx plan.

[49] I disagree. On the specific point, I agree with the analysis of the Divisional Court:

Insofar as the transfer of assets is concerned the argument that s. 81(6) and (7) apply, is, in our view, in error. These sections refer to the situation where assets are transferred "without the prior consent of the Superintendent . . .". That is not the case here, the assets were transferred with the consent of the Superintendent.

[50] On the general point, I see no principled basis for interfering with the Divisional Court's decision to order the return of the pension assets to Weavexx. Once the Superintendent's decision was set aside, an order which had the effect of returning the parties to their original positions can hardly be viewed as frustrating the purposes of the PBA.

[51] On the component of the decision according a compulsory role to the Tribunal on any future decision on the wind-up issue, the respondents in effect concede in their factum that the Divisional Court erred:

65. The Superintendent has pointed out that interpreted liberally, the reasons of the Divisional Court would require that any future decision by the Superintendent on the request for a partial wind up must be referred to a Tribunal hearing, regardless of whether any party requests a hearing. This could not reasonably have been intended by the Divisional Court. All parties agree that the decision of the Superintendent with respect to the wind up request should be referred to the Tribunal only at the request of one of the affected parties.

[52] This is a fair concession. Section 89 of the PBA permits a party affected by a potential wind-up order by the Superintendent to request a hearing by the Tribunal. The Divisional Court erred by making such a hearing mandatory.

(3) The costs issue

[53] The Divisional Court awarded costs on a solicitor and client scale "for a number of reasons":

- (a) The matter was indeed a complex one made more complex by the lack of support given by both the office of the superintendent and BTR.
- (b) This attitude was demonstrated by the manner in which the assets were finally merged, notwithstanding the original representation that they would be kept separate and apart and the lack of information given to the applicants by the Superintendent and, indeed, to their counsel when it appeared that litigation was being contemplated.
- (c) The fact that it is not clear whether or not the Superintendent had taken any position with respect to the wind-up of the Weavexx plan.
- (d) Finally, by the fact that BTR would not support these retirees by providing them with funds in order to retain counsel to make submissions on their behalf.

[54] In my view, the record supports these four reasons. The Superintendent appears never to have made a decision on the wind-up request made by the respondents. The appellant corporations also did not treat the respondents properly. They did not send a copy of the valuation report to the PAC until almost five months after the transfer application was filed, even though they knew that the PAC was deeply concerned about the matter. They did not assist the PAC with legal representation, even though the pension plan had a surplus of \$4.2 million and Weavexx had not contributed a penny to it for 13 years.

[55] In summary, although solicitor and client costs should be awarded only in exceptional cases, I can see no basis for interfering with the Divisional Court's conclusion that this was such a case.

E. Disposition

[56] I would allow the appeal in part. I would set aside those components of the Divisional Court's decision in which the court concluded that the corporate appellant BTR had not accorded procedural fairness to the respondents and ordered that any future decision made by the Superintendent on the wind-up issue be automatically referred to the Financial Services Tribunal.

[57] In all other respects, I would dismiss the appeal.

[58] The respondents have been substantially successful on the appeal. I would award them costs of the appeal payable by all of the respondents.

Order accordingly.

Notes

Note 1: Now the Superintendent of Financial Services.

Note 2: The respondent Tom Wood passed away in 1998.

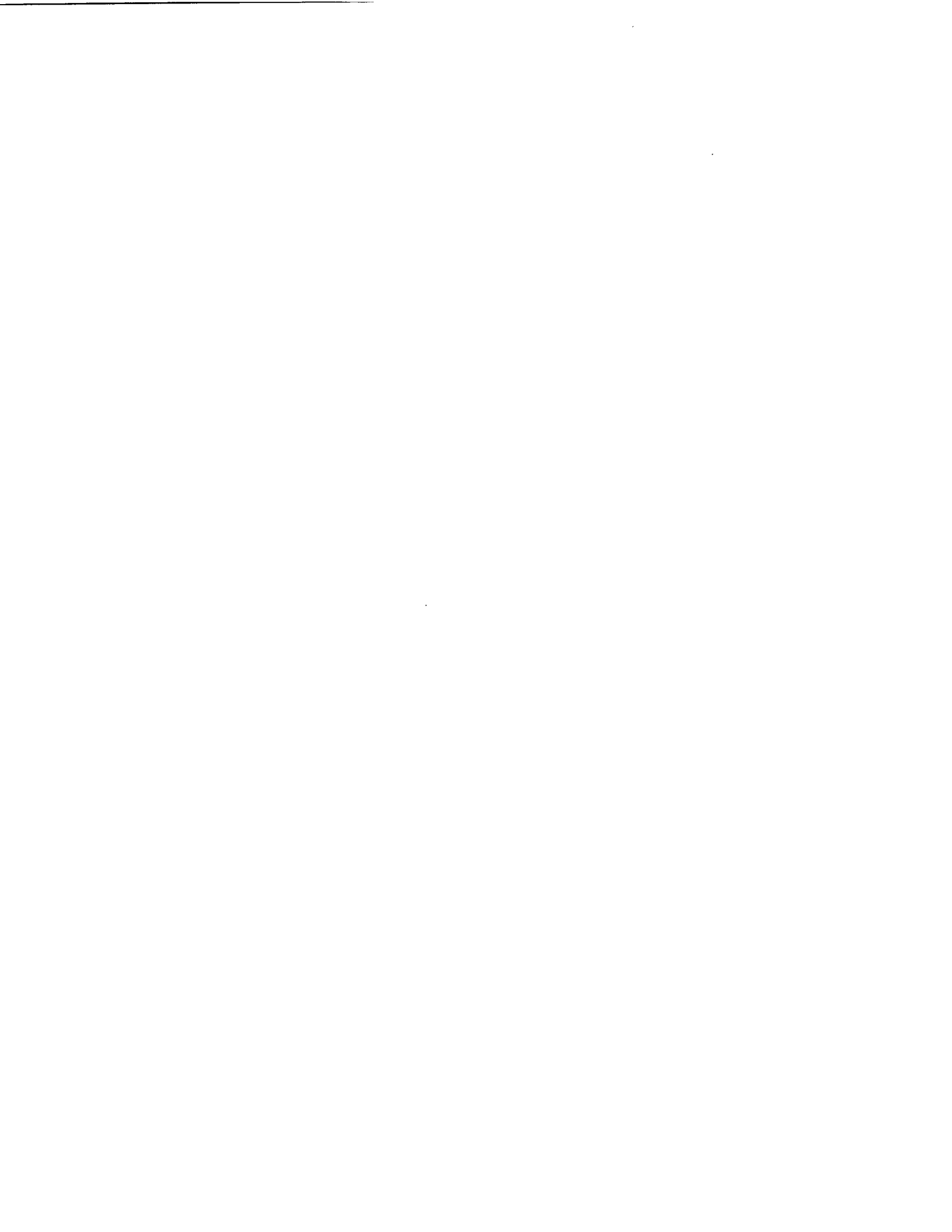
Note 3: Now the Financial Services Commission of Ontario.

Note 4: Released today [see p. 367 O.R., supra].

Note 5: I note in passing that none of the appellants takes the position that a winding-up order can flow only from an application by the employer. Although s. 68 of the PBA envisions a wind-up process initiated by the employer, s. 69 is not limited in this fashion. Indeed, the steps the Superintendent took in this case, to be discussed below, indicate that the Superintendent regarded it as his duty to deal with a wind-up request from the respondent retirees.



Tab 14



As a statutory court, the Federal Court of Canada has no jurisdiction except that assigned to it by statute. In light of the inherent general jurisdiction of the provincial superior courts, Parliament must use express statutory language where it intends to assign jurisdiction to the Federal Court. In particular, it is well established that the complete ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court (rather than simply concurrent jurisdiction with the superior courts) requires clear and explicit statutory wording to this effect. This latter principle finds early expression in the judgment in *Peacock v. Bell* (1677), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88:

And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.

This basic principle continues to be applied up to the present day....¹³⁴

Section 646 of the *Canada Shipping Act* conferred jurisdiction on the Admiralty Court for actions arising out of wrongful death. There was nothing in the section purporting to remove jurisdiction from other courts. Thus, Iacobucci and Major JJ. concluded:

The lack of any express language ... excluding superior court jurisdiction, or vesting sole jurisdiction in the Admiralty Court, is sufficient by itself to justify interpreting s. 646 as conferring on the Admiralty Court only concurrent jurisdiction over fatal accident claims by dependants. This finding accords with the basic principle of statutory construction that a statute should not be interpreted as abrogating the inherent jurisdiction of the superior courts unless it employs clear language to this effect....¹³⁵

Modern courts concede the necessity and desirability of referring some types of dispute to statutory tribunals. However, they are careful to reserve their jurisdiction to review the decisions of inferior tribunals to ensure compliance with the law. For this reason, and in keeping with s. 96 of the *Constitution Act*, private clauses are strictly construed.¹³⁶

SOCIAL WELFARE LEGISLATION

Governing principle. Social welfare legislation is to be liberally construed so as to advance the benevolent purpose of the legislation. If reasonable doubts or ambiguities arise, they are to be resolved in favour of the claimant. By providing benefits to the community or to groups in the community, social welfare legisla-

(S.C.C.); *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] S.C.J. No. 9, [1989] 1 S.C.R. 206, at 217 (S.C.C.); *Valin v. Langlois*, [1879] S.C.J. No. 2, [1879] 3 S.C.R. 1, at 19-20 (S.C.C.); *ibid.*, at para. 46.

¹³⁴ *ibid.*, at para. 61.

¹³⁵ See also *Vaughan v. Canada*, [2005] S.C.J. No. 12, [2005] 1 S.C.R. 146, at paras. 27-29, 33 (S.C.C.).

¹³⁶ See *Crevier v. A.-G. (Quebec)*, [1981] S.C.J. No. 80, [1981] 2 S.C.R. 220, at 236-38 (S.C.C.).

ture achieves a fairer allocation of social goods and may improve the health, security or dignity of targeted members of the community. The courts' primary concern is ensuring the intended benefits are received.

This "favour the claimant" principle was first asserted by the Supreme Court of Canada in *Abrahams v. Canada (Attorney General)*.¹³⁷ The issue in the case was whether the appellant was entitled to benefits under the *Unemployment Insurance Act*. Wilson J. wrote:

Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation of the re-entitlement provisions. I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant....¹³⁸

Since *Abrahams* was decided, the notion that social welfare legislation is to receive a liberal construction has become firmly established.

In *Gray v. Ontario (Disability Support Program, Director)*,¹³⁹ for example, the Ontario Court of Appeal had to decide whether the appellant was a "person with a disability" within the meaning of the *Ontario Disability Support Program Act* and therefore eligible for income support under the Act. In determining that she came within the statutory definition of this expression, the court relied in part on the liberal construction rule. McMurtry C.J.O. wrote:

As remedial legislation, the ODSPA should be interpreted broadly and liberally and in accordance with its purpose of providing support to persons with disabilities....

It is my view that as social welfare legislation, any ambiguity in the interpretation of the ODSPA should be resolved in the claimant's favour. In *Wedekind v. Ontario (Ministry of Community and Social Services)*¹⁴⁰ ... this court stated:

[T]he principle of construction ... applicable to social welfare legislation ... is, where there is ambiguity in the meaning of a statute, the ambiguity should be resolved in favour of the applicant seeking benefits under the legislation.

The rationale for such an approach was set out by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, [2001] F.C.J. No. 1217, at para. 26, 205 D.L.R. (4th) 58 (F.C.A.)¹⁴¹ as follows:

The liberal approach to remedial legislation flows from the notion that such legislation has a benevolent purpose which courts should be careful to respect.¹⁴²

¹³⁷

[1983] S.C.J. No. 2, [1983] 1 S.C.R. 2, at 7-8 (S.C.C.).

¹³⁸

Ibid., at 7-8. See also *Caron v. Canada (Employment & Immigration Commission)*, [1991] S.C.J. No. 2, [1991] 1 S.C.R. 48, at 307-08 (S.C.C.).

¹³⁹

[2002] O.J. No. 1531, 212 D.L.R. (4th) 353 (Ont. C.A.).

¹⁴⁰

[1994] O.J. No. 2849, 21 O.R. (3d) 289, at 296-97 (Ont. C.A.); leave to appeal to S.C.C. refused 191 N.R. 397n.

¹⁴¹

[2001] F.C.J. No. 1217, at para. 26, 205 D.L.R. (4th) 58 (F.C.A.).

¹⁴²

Supra note 139, at paras. 9, 10 & 12. See also *Mule v. Ontario (Director, Disability Support Program)*, [2007] O.J. No. 5322, at para. 19 (C.A.); *Morrison (Estate) v. Cape Breton Devel-*



Tab 15



FINANCIAL SERVICES TRIBUNAL

Citation: Dustbane Enterprises Limited v. Ontario (Superintendent Financial Services),
201 ONFST 7
Decision No. P0095-1999-2
Date: 2001/02/15

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c.P.8, as amended by the
Financial Services Commission of Ontario Act, 1997, S.O. 1997, c.28 (the "Act");

AND IN THE MATTER OF a proposal by the Superintendent of Financial Services to
Make an Order under section 87 of the Act respecting the **Retirement Plan for
Employees of Dustbane Enterprises Limited**, Registration Number 229419 (the
'Plan');

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the Act;

B E T W E E N:

DUSTBANE ENTERPRISES LIMITED

Applicant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES, 548264 ONTARIO INC., and 818787
ONTARIO LIMITED**

Respondents

BEFORE:

Kathryn M. Bush
Vice Chair of the Tribunal and Chair of the Panel

Louis Erlichman
Member of the Tribunal and of the Panel

David Wires
Member of the Tribunal and of the Panel

APPEARANCES:

Andrew K. Lokan and
Karen Shaver
For the Applicant

Deborah McPhail
For the Respondent Superintendent

Linda Galessiere
For the Respondents
548264 Ontario Inc. and

818787 Ontario Limited

HEARING DATES: October 3, 4, 5 and 16, 2000

REASONS FOR MAJORITY DECISION

A. THE BACKGROUND

The Dustbane Pension Plan (the "Plan") was originally registered with the Pension Commission of Ontario on June 1, 1967. Prior to September 1, 1984, the Plan was an annuity purchase plan funded through a Group Deferred Annuity Contract with Standard Life Assurance Company of Canada. Effective June 1, 1984, the Plan became a defined benefit plan and was funded through a Trust Agreement with Mutual Life (now Clarica).

Dustbane Enterprises Limited ("Dustbane") is the Administrator of the Plan. The Plan is for the employees of Dustbane, its subsidiaries, associated or affiliated companies and distributors. The Respondents 548264 Ontario Inc. and 818787 Ontario Limited were at June 1, 1990 distributors under the Plan.

Subsequent to discussions about changing the contractual relationship between Dustbane and its distributors, the Directors of Dustbane passed a resolution on January 30, 1990 to amend the Plan effective June 1, 1990 to provide that distributors would no longer be part of the Plan and that assets equal to the transfer value would be transferred "to an RRSP, lock-in RRSP, or paid in cash to each employee depending on what they are entitled." The transfer value relative to the distributors was later determined to be \$303,700.

At June 1, 1990, the companies in the distributor group (the "Distributors") were J. W. Evans Lessee-Dealer Ltd., Masters Sanitation Ltd., S.M. Bouchard (1978) Inc., D.R. Huntington Sales Ltd., Robinson Sanitation, J.J. Edstrom (1974) Ltd., 818787 Ontario Limited, Mutual Sanitation & Supplies Ltd. and Columbia Distributors Ltd.

At that time none of the Distributors was an affiliate of Dustbane within the meaning of the term "affiliate" in the *Ontario Business Corporations Act*, R.S.O. 1990, c.B.16.

On February 27, 1991 the Plan Actuary filed the Partial Wind-Up Report relating to the June 1, 1990 wind-up. A revised Wind-Up Report was filed on September 23, 1991 which showed a deficit (apparently for the entire plan) of \$33,154. That report indicated that it was "decided to ignore the small going concern deficit because that deficit will be funded as outlined in actuarial valuation as of September 30, 1989." An Actuarial Valuation Report as at June 30, 1995 then showed that the wind-up related to the Distributors was now in a \$212,000 deficit. That Report noted "Benefits were valued at 12% interest. Between June 1, 1990 and June 30, 1995 those assets earned the same rate of return as the whole pension fund while the corresponding liabilities grew at a rate of 12%."

The increase in the deficit arose from the difference between actual Plan earnings and the 12% growth in the liabilities, as well as additional actuarial fees incurred.

In August 1997, Dustbane's Actuary apportioned the deficit for the partially wound-up portion of the Plan amongst the Distributors, notified each Distributor of the amount of its proportionate share of the deficit, and directed each Distributor to pay its share directly to Mutual Life, now Clarica. To date, only one Distributor, Mutual Sanitation, has paid its share of the deficit. One Distributor has become bankrupt since the partial wind up.

The Plan Actuarial Valuation as of June 30, 1998 for the Plan shows that the deficit in the partially wound-up portion of the Plan had increased to \$261,400 as of that date.

On December 21, 1999, the Superintendent made a Notice of Proposal to Make an Order requiring Dustbane to pay an amount equal to the total of all payments due or accrued and not paid as at June 1, 1990 plus interest to the date of payment.

On February 26, 2000, Dustbane brought an application to request a hearing before the Tribunal to direct the Superintendent to refrain from making or carrying out the proposed Order.

At the first pre-hearing conference convened by the Tribunal it was agreed that notice of the hearing would be provided to both the Distributors and the affected former members. As a result of that notice 548264 Ontario Inc. and 818787 Ontario Limited requested to be added as parties to this proceeding, along with Dustbane and the Superintendent. That request was granted upon the consent of the other parties.

B. THE ISSUES

At the Pre-Hearing Conferences the parties agreed that the issues to be determined in this proceeding were as follows:

- (a) As at Partial Wind-Up date, was the Plan a multi-employer plan within the meaning of s.1 of the Act?
- (b) If the answer to issue (a) is "yes", who is required to fund the deficit in the Plan's fund?
- (c) If the answer to issue (a) is "no", who is required to fund the deficit in the Plan's fund?
- (d) Does the Tribunal have a jurisdiction to take into account any delay on the part of the regulator in its determination of the above issues?
- (e) If the answer to issue (d) is "yes", are Dustbane or any of the Distributors liable for the deficit in light of the delay by the regulator in the circumstances of this case?

C. ANALYSIS

- (a) As at the partial wind-up date, was the Plan a multi-employer plan within the meaning of section 1 of the Act?

The Act in section 1 defines an “employer” and a “multi-employer pension plan” as follows:

“employer” in relation to a member or a former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related, and “employed” and “employment” have a corresponding meaning;

“multi-employer pension plan” means a pension plan established and maintained for employees of two or more employers who contribute or on whose behalf contributions are made to a pension fund by reason of agreement, statute or municipal by-law to provide pension benefit that is determined by service with one or more of the employers, but does not include a pension plan where all the employers are affiliates within the meaning of the *Business Corporations Act*;

Two issues were raised in this proceeding relating to this matter. The first was whether the Distributors were in fact employers within the meaning of the Act or whether in fact Dustbane was properly characterized as the “employer” of the Distributor’s workers for purposes of the Act. The second was whether even if the Distributors were employers for the purposes of the Act whether they agreed to contribute to the Plan.

Considerable evidence was presented on the relationship between Dustbane and the Distributors:

- all the Distributors were separate corporate entities from Dustbane;
- there was no common ownership between Dustbane and the Distributors;
- the Distributors were lessees of their business premises, which included office and warehouse facilities;
- the Distributors appointed their own board members and Dustbane had no role in the Distributors’ boards;
- the Distributors approved their own By-laws/Articles of Incorporation and Dustbane had no role in this;
- the assets of one Distributor were not available to satisfy the debts of another;
- Dustbane prepared cheques for Distributors. In the 1980’s, Dustbane began using a direct deposit system for payroll, in which funds were transmitted directly from Dustbane to the Distributors’ employees’ bank accounts;
- The Dustbane logo was used on the cheques, invoices, and other stationery used by the Distributors, in addition to the Distributor’s name, and Dustbane’s signs were prominently displayed Distributors’ premises.

- Dustbane did not hire and fire, discipline, or set rates of pay for the Distributors' employees, although commission rates for sales staff were the same at Dustbane and each of the Distributors;
- Dustbane had no signing authority on the Bank accounts of the Distributors;
- if the Distributor required a bank loan (and at some point, all of the Distributors required financing), Dustbane guaranteed the loan; and
- Dustbane did not control the Distributors' access to funds. However, where Dustbane had guaranteed the Distributor's bank loan, Dustbane reviewed any withdrawals.

The 1984 restatement of the Plan provides as follows:

s.1.8 "Employer" shall mean Dustbane Enterprises Limited, its subsidiaries or affiliated companies and its distributors who have elected in writing to participate in the Plan.

No written elections were apparently ever made. Dustbane's witness testified that when the Plan was amended and restated in 1984 this was simply a continuation of the existing Plan and therefore that despite the Plan wording written elections were not necessary.

The standard clause in the Distributor agreements covering Dustbane's provision of services was as follows ("Buyer" is the Distributor):

8. Services

Buyer agrees to employ Dustbane exclusively to maintain its books and records of account and Dustbane agrees to provide, in addition to this service, advice by specialists in all areas of operation, advertising and merchandising program and the fulfillment of Buyer's reasonable request for assistance, all services to be provided at a fee of 5% on Buyer's sales volume.

Buyer shall have the irrevocable right at all reasonable times to complete access to and audit said Books and Records of Accounts by an independent auditor of its choice at its own expense. Dustbane agrees to supply the services described in this paragraph with respect of any matter only where, in the opinion of the advisors of Dustbane, the interests of Dustbane and of the Buyer do not conflict.

Dustbane maintained that the 5% fee in the "services" section of the Distributor Agreements was meant to cover the cost of administration of the Plan by Dustbane but not contributions to the Plan.

The Act has many references to multi-employer pension plans (MEPPs) in addition to the definition in Section 1.

- Section 8(1)(e) provides that MEPPs “established pursuant to a collective agreement or a trust agreement” must be governed by a board of trustees with at least 50% member representation.
-
- Section 10(2) requires that “the documents that create and support a multi-employer pension plan pursuant to a collective agreement or a trust agreement shall set out the powers and duties of the board of trustees that is the administrator of the multi-employer pension plan.”
- Section 14(2) exempts MEPPs “established pursuant to a collective agreement or a trust agreement” from the general prohibition on reducing earned benefits.
- Section 61 requires that an employer who is required to make contributions to a MEPP “shall transmit to the administrator of the plan a copy of the agreement that requires the employer to make the contributions or a written statement that sets out the contributions the employer is required to make and any other obligations of the employer under the pension plan.”
- Section 85 exempts “Pension benefits provided under a multi-employer pension plan” from the guarantees of the Pension Benefits Guarantee Fund (PBGF).
- Section 40(t) of Regulation 909 requires that the annual statement for members of MEPPs include a statement that benefits are not guaranteed by the PBGF and are subject to reduction if liabilities exceed assets at plan wind up.

This is not an exhaustive catalogue of references to multi-employer pension plans in the Act, nor are the references entirely consistent. In some cases, the reference is to a MEPP “established pursuant to collective agreement or trust agreement”, while in others, notably Sections 61 and 85 and Section 40 of the Regulation, the reference is simply to a multi-employer pension plan.

One of the key aims of the Act is the protection of the benefits earned by plan members and beneficiaries. The Act lays down stringent wind up obligations for employers, and establishes a Guarantee Fund to protect members in the event of employer insolvency at wind up.

The provisions of the Act, read together, create a class of multi-employer plans, which are qualitatively different than plans sponsored by a single employer. The Act accepts the limitation of employer liabilities within MEPPs, and exempts MEPPs from Guarantee Fund coverage, but insists on a clear statement of employer obligations, for the protection of plan members and beneficiaries, and an arguably higher level of trust obligations.

Dustbane has argued for the lowest possible standard in assessing whether a plan qualifies as a multi-employer plan. Referring only to Section 1 of the Act, Dustbane argues that participation in the plan by members employed by corporate entities with some level of independence, and indirect evidence of funds flowing from these entities to the pension fund, are sufficient to render a pension plan a MEPP.

In this case, Dustbane made no effort, prior to the partial wind up, to constitute their pension plan as a MEPP. There were no written agreements concerning pension plan participation with any of the entities which Dustbane now purports to have been separate employers within the MEPP. In none of the Dustbane's reporting to the Pension Commission, from their initial application for registration in 1964 until the partial wind up application, was the plan ever referred to as a MEPP, even when the existence of a MEPP was a specific question on the report. In the three years prior to the partial wind up, the Dustbane pension plan made contributions to PBGF, which would have been unnecessary contributions for a MEPP.

The annual statements sent by Dustbane to pension plan members did not contain the prescribed (by Section 40(t) of the Regulations) warning that, since the plan was a MEPP, there was no PBGF protection, and that benefits could be reduced on wind up.

These were not minor technical breaches of the legislation. It goes directly counter to the protection of plan members and beneficiaries, which is at the core of the Act, to allow an employer to claim, after having failed to meet the clear requirements of the legislation, that the plan is a multi-employer plan, and thereby to evade liabilities on partial wind up.

The Dustbane pension plan clearly failed to meet the requirements of a multi-employer plan under the Act.

Even if it were concluded that the threshold for a MEPP is at the low level proposed by Dustbane, would their argument that each of the Distributors is a separate employer be successful?

On the question of what constitutes an employer, we cannot simply look at whether the Distributors would be considered as separate employers for the purposes of income tax, labour relations, or other legislation. There are a variety of precedents in a variety of legal contexts which require us to consider the specific facts of each case in relation to the legislation at hand, in deciding who is the actual employer.

There is no doubt that each of the Dustbane Distributors was separately incorporated, and named as the employer on employee T-4 forms.

The relationship between Dustbane and its Distributors was a tangled one. Each Distributor was set up to act as Dustbane's sole distributor in a particular geographic area. Dustbane strictly controlled the actions of the Distributors through a distributor agreement. For each of the Distributors, Dustbane laid down sales quotas, limited sales of non-Dustbane products, set wholesale and retail prices, acted as lessor for the Distributors' offices, guaranteed bank loans to Distributors and generally oversaw all of the financial and other operations of the distributors (for a management fee of 5% of gross sales). The distributor agreements make no mention of the pension plan, or of any employee benefit plan.

Dustbane argued that, despite the lack of any written agreement by any of the Distributors, a decades-long history of plan contributions was clear evidence of a tacit agreement by the Distributors to participate in the pension plan as employers. This argument conflicts somewhat with the Dustbane proposition that each of the Distributors was an independent corporate entity. All of the Distributor Corporations do not have an unbroken history to 1959, and in at least one case, the Distributor Corporation was formed less than a year before the partial wind up.

In 1984, the Dustbane Board of Directors unilaterally converted the Dustbane pension plan from an insured basis to a trustee defined benefit basis, a major change, which increased the possibility of the partial wind up deficit. The decision to convert the plan was made without participation of, or consent by, any Distributor.

The 1984 plan text explicitly requires a written agreement to participate in the pension plan by each employer. It also names the employer as administrator. No written participation agreement was ever obtained from any Distributor, even those who came into being after the 1984 plan changeover. The decision to partially wind up the plan, which Section 68(1) of the Act gives to the Administrator of a multi-employer plan, was made unilaterally by Dustbane. The use of actuarial services for the partial wind up, which accounts for a significant portion of partial wind up deficit, was directed solely by Dustbane.

Prior to the partial wind up, Dustbane did not inform the Distributors that they were Employers (and also, according to plan text, Administrators), and might have particular legal and financial obligations as Employers and Administrators. Dustbane provided the Distributors with no plan documents, other than annual statements sent to the Distributors personally as plan members (which did not identify the plan as a MEPP). Evidence was presented that members' plan statements were distributed via Distributors.

Distributors never took any role as plan administrators, never formally ceded their responsibilities as administrators, or were even consulted on matters like the use of plan surpluses, which would normally be a matter for discussion by plan sponsors and administrators.

When, subsequent to the wind up, the Distributors were told that they could bear some extra liability as the result of the wind up, they requested, first informally, and then formally, basic plan documents, including the plan text. Dustbane refused to provide this information.

Dustbane has argued that the lack of written participation agreements signed by Distributors was a minor clerical oversight. The sections of the Act quoted above show the importance, in the legislation, of clear documentation of Employer obligations in a multi-employer pension plan. Dustbane, acting as sole Administrator of the plan, in sole possession of plan documents, would have been aware, as the Distributors would not, that the plan required Distributors, if they were separate Employers for purposes of the plan, to sign written participation agreements. This was never done.

Dustbane has argued that the fact that "employer contributions" were made by the Distributors is clear proof of the Distributors' tacit agreement to participate in the Dustbane pension plan as employers. Leaving aside the requirements of both the Act and the Dustbane plan text for explicit written documentation, this assertion is questionable.

On the basis of the evidence presented, it would appear that the cheques prepared by Dustbane for Distributor signature covered overall payroll costs, with no breakdown of payments for the benefits package, let alone payments for employer pension contributions. It is difficult to read employer agreement to participate into payments of which the Distributors were largely unaware.

It is clear that Dustbane acted, until the possibility arose of transferring the responsibility for partial wind up liabilities to the Distributors, as if it were the sole employer and sole administrator of the Dustbane Pension Plan.

If the Distributors were, in fact, separate employers under the Dustbane Plan, Dustbane seriously breached its fiduciary duties as Administrator, under Section 22 of the Act, to the Plan members, and to the Distributors as Employers and co-Administrators, in failing to obtain written participation agreements and consistently failing to act to ensure that employer obligations were broadly understood and would be met.

We therefore conclude that, for purposes of the Act, this plan is not a multi-employer plan, and that Dustbane is the employer.

(c) If the answer to issue (a) is “no”, who is required to fund the deficit in the Plan’s fund?

As we have concluded that this is not a multi-employer plan, the obligation to fund the deficit falls on the Employer, Dustbane.

(d) Does the Tribunal have a jurisdiction to take into account any delay on the part of the regulator in its determination of the above issues?

There is no question that delay occurred in this matter. A June 1, 1990 partial wind-up resulted in a Notice of Proposal over nine years later.

In addition, it appears that a total of 28 employees or officers of PCO/FSCO worked on the Dustbane application between its filing and Notice of Proposal, including 11 Pension Officers, 4 Analysts, Acting Officers or Assistants, 4 Plan Examiners, 2 Actuaries, 5 Consultants, and 3 Directors.

There is, however, a question as to the cause of that delay.

The following is a chronology of the partial wind-up application which is clearly illustrative of delay.

- | | |
|--------------------|--|
| March 29, 1990- | Dustbane advises Pension Commission of Ontario (“PCO”) of its intention to partially wind up Plan; |
| April 5, 1990- | PCO Officer acknowledges letter and requests additional information; |
| April 11, 1990- | Dustbane provides PCO with copy of Notice to Distributors dated March 24, 1990 regarding the partial wind-up; |
| May 7, 1990- | Dustbane provides Distributors with estimates of employer obligations as a result of partial wind up of plan – states that exact options and amounts will only be available “after June 1, 1990 once contribution data to June 1 st has been received from your offices”; |
| February 27, 1991- | Dustbane files first Partial Wind-Up report; |

- July 11, 1991- Dustbane requests review and approval of Modern Building Transfer by July 31, 1991;
- August 8, 1991- PCO requests that Dustbane complete Checklist and questions the Dustbane actuary's interest rate assumptions;
- August 15, 1991- Dustbane certifies that all contributions have been made to pension fund to date of partial wind-up;
- September 20, 1991- Dustbane requests approval to pay benefits to Huntington employee – G. Courtney;
- September 23, 1991- Dustbane files Revised Wind Up Report including Superintendent's Checklist and the Dustbane actuary explains basis for attributing interest rates;
- October 22, 1991- Superintendent authorizes payment of benefits to G. Courtney on condition that transfer ratio maintained at "1";
- November 1, 1991- PCO staff advises actuary of deficiencies in Superintendent's checklist and that Partial Wind-Up Report cannot be approved until Modern Building Transfer asset approved;
- November 6, 1991- Dustbane actuary advises administrator that Huntington must pay \$173.03 with respect to G. Courtney to maintain transfer ratio of "1";
- December 13, 1991- Dustbane submits Revised Superintendent's Checklist addressing all deficiencies in PCO letter of 1/11/91;
- March 20, 1992- Letter from PCO staff regarding further deficiencies and requests information about revised Partial Wind-Up report filed on September 23/91;
- October 2, 1992- Dustbane provides expanded solvency valuation and responds to all issues raised in letter of 03/20/92;
- May 3, 1993- Dustbane files Final Asset Transfer report for Modern Building Cleaning Inc. sale;
- August 30, 1993- Superintendent approves Asset Transfer on condition that Dustbane files certified Notice to Plan Members of asset transfer;
- November 8, 1993- Dustbane files Final Partial Wind Up Report including revised interest rates;
- May 31, 1994- Dustbane files certified copy of Notice to employees regarding Modern

- Building Asset Transfer and Superintendent gives final approval of asset transfer;
- September 7, 1994- Dustbane actuary writes letter to PCO regarding summary of events, breakdown of member benefits using revised interest rates and requests direction and approval to file valuations;
- January 5, 1995- Dustbane actuary contacts PCO requesting response to letter of 09/07/94;
- January 13, 1995- Letter from PCO asking Dustbane to clarify partial wind-up report information and requests other information;
- April 30, 1996- Dustbane resubmits all documents requested, responds to all issues raised and indicates dates that documents addressing issues were originally filed with PCO;
- July 22, 1996- Letter from PCO requesting clarification about information included in all partial wind up reports;
- December 19, 1996- Telephone call between PCO and Dustbane actuary regarding triennial valuation as at June 30, 1995;
- January 30, 1997- Letter from PCO to Dustbane actuary indicating that the partial wind-up will be forwarded to Superintendent for decision by February 6, 1997;
- January 31, 1997- Dustbane files June 30, 1995 actuarial valuation;
- February 3, 1997- Dustbane responds to PCO letter of 7/22/96 by referring PCO to previous partial wind-up reports and submissions;
- February 28, 1997- PCO sends enforcement letter regarding deficit at June 1, 1990;
- March 4, 1997- Dustbane responds with letter from Mutual Life confirming that special payment - \$78,000 made on January 22, 1997;
- August 11, 1997- Dustbane actuary allocates deficit among distributors and advises each to make payments directly to Mutual Life;
- March 18, 1998- Dustbane advises former member that benefits cannot be paid until deficit paid;
- September 8, 1998- PCO advises Dustbane that Superintendent gave blanket approval to pay benefits;
- October 26, 1998- Dustbane advises the Financial Services Commission of Ontario ("FSCO") that it is not in position to finalize member benefits because of unfunded liability and member's employer is bankrupt;

- November 27, 1998- s.98 letter to Dustbane demanding copy of written agreement to participate in plan and up-to-date list of distributors;
- December 21, 1998- Dustbane responds to FSCO, provides copies of distribution agreement and explains service provision, how distributors and employers contribute to plan and the names and addresses of distributors as requested;
- March 2, 1999- s.98 letter to Dustbane;
- March 8, 1999- Response from Dustbane;
- March 19, 1999- Dustbane files actuarial valuation as at June 30, 1998;
- June 28, 1999- Distributor S.M. Bouchard provides T4 slips 1989-1990 showing S.M. Bouchard Inc. as employer;
- June 29, 1999- s.98 letter states that the information provided does not adequately address issue of written or oral agreement;
- June 29, 1999- s.98 letter to distributors regarding the deficit in plan at June 1, 1990;
- August 4, 1999- FSCO requests that Dustbane actuary provide breakdown of deficit and professional fees since partial wind-up;
- August 12, 1999- Dustbane actuary responds to FSCO and provides a reconciliation of asset changes from 1990 – 1995 and from 1995 – 1998;
- August 30, 1999- Distributor J.W. Evans provides copy of distribution agreement;
- September 14, 1999- Dustbane actuary provides further response to FSCO request regarding a reconciliation of professional fees for 1990-1998;
- October 18, 1999- Letter from solicitor for J.W. Evans – Distributor explaining relationship with Dustbane, including copies of T4 slips 1985, 1988 – 1990 showing J.W. Evans as employer; and
- December 21, 1999- Superintendent issues Notice of Proposal to Make an Order against Dustbane.

The Superintendent led evidence on the issue of delay to show that Dustbane was aware each year of the Plan's fund's rate of return and of the 12% interest rate being applied to the partial wind up and that the size of the deficit as revealed in early 1997 should have caused concern. Further, the Modern Building asset transfer took what appeared to be an inordinate amount of time, 4 years, to complete and this hampered the completion of the partial wind-up. In addition, no funding schedule had ever been filed for the deficit shown in the 1989 report, and a

funding schedule was necessary in order to obtain approval of the partial wind-up report. Finally, the fact that Dustbane did not complete actuarial valuations between 1986 and 1995 also seemed to slow down the process.

Without commenting on the source of the delay at this time, it is clear that the time spent to complete this partial wind-up contributed significantly to the deficit in this Plan. The members' benefits ought to be protected irrespective of any delay and therefore we do not believe that any delay should affect our findings above.

The question of delay, however, may be relevant to any party seeking an award of costs in this matter.

D. THE DISPOSITION

We reject Dustbane's application and direct the Superintendent to carry out her proposal contained in the Notice of Proposal.

We make no order as to the costs of this proceeding but the panel will entertain written representations on that matter from any of the parties who wish to make them.

DATED at Toronto, this 15th day of February, 2001.

"Louis Erlichman"

Louis Erlichman
Member of the Tribunal and of the Panel

"David Wires"

David Wires
Member of the Tribunal and of the Panel

REASONS FOR MINORITY DECISION

A. ANALYSIS

For the reasons described below I disagree with the Majority Decision except with respect to the issues of delay and costs.

- (a) As at the partial wind-up date, was the Plan a multi-employer plan within the meaning of section 1 of the Act?

The Majority Decision sets out (i) the definitions of an “employer” and a “multi-employer pension plan” from section 1 of the Act and (ii) the testimony of the witnesses for all the parties on the issue of employer status and I will not repeat them.

Two issues were raised in this proceeding relating to this matter. The first was whether the Distributors were in fact employers within the meaning of the Act or whether in fact Dustbane was properly characterized as the “employer” of the Distributor’s workers for purposes of the Act. The second was whether even if the Distributors were employers for the purposes of the Act whether they agreed to contribute to the Plan.

While it is clear that Dustbane had significant influence on the Distributors by virtue of the bank guarantees and the terms of the Distributorships relating to signage and logo usage among other matters, it is also clear that the relationship of the Distributors and their workers was one of employer/employee. The Distributors chose who to hire, including family members, who to fire and the salary levels. Day-to-day operations were controlled entirely by the Distributors. The Distributors maintained employer status for tax purposes.

It is true that the employee/employer status has been interpreted with respect to the purpose of the relevant legislation. The question then arises as to whether the purposes of the Act would alter the determination of the Distributors as employers.

The Act is remedial intended to ensure that pension benefits which are promised are paid. The purposes of the Act do not, however, prefer payment by one employer rather than the other. Accordingly, the purposes of the Act do not justify any alteration in the finding of the Distributors as employers in this proceeding.

The second issue now to be considered is whether the Distributors agreed to contribute to the Plan.

It should be recalled that the definition of “multi-employer pension plan” in section 1 of the Act, as quoted above, has three requirements:

- (a) two or more employers contribute to a pension plan for employees, or contributions are made on their behalf;
- (b) the contributions are made by reason of an agreement, statute, or municipal by-law; and

- (c) the employers are not affiliates within the meaning of the *Business Corporations Act*.

The third requirement was accepted by all parties as being satisfied. Given the finding that the Distributors are employers the first requirement is also satisfied. Accordingly, the matter to be determined was whether contributions were made to the Plan by the Distributors as a result of an agreement.

The 1984 restatement of the Plan provides as follows:

s.1.8 "Employer" shall mean Dustbane Enterprises Limited, its subsidiaries or affiliated companies and its distributors who have elected in writing to participate in the Plan.

No elections were apparently ever made. Dustbane's witness testified that when the Plan was amended and restated in 1984 this was simply a continuation of the existing Plan and therefore that despite the Plan wording written elections were not necessary.

Dustbane maintained that the 5% fee in the "services" section of the Distributor Agreements was meant to cover the cost of administration of the Plan by Dustbane but not contributions to the Plan.

8. Services

Buyer agrees to employ Dustbane exclusively to maintain its books and records of account and Dustbane agrees to provide, in addition to this service, advice by specialists in all areas of operation, advertising and merchandising program and the fulfillment of Buyer's reasonable request for assistance, all services to be provided at a fee of 5% on Buyer's sales volume.

Buyer shall have the irrevocable right at all reasonable times to complete access to and audit said Books and Records of Accounts by an independent auditor of its choice at its own expense. Dustbane agrees to supply the services described in this paragraph with respect of any matter only where, in the opinion of the advisors of Dustbane, the interests of Dustbane and of the Buyer do not conflict.

The evidence supports the following findings:

Initially, Dustbane prepared and sent out payroll cheques to the Distributors for signature by them and distribution to their own employees. At some point in the 1980's, following an incident in which a group of cheques were lost, Dustbane moved to a system whereby Dustbane (still merely providing a payroll service) would send or deposit pay cheques directly to the Distributors' employees, and be reimbursed by the Distributors.

Both employee and employer remittances to the Plan (as well as other benefits) were effected by means of cheques prepared by Dustbane and sent to the Distributors for signature, payable in the case of the Plan directly to the Mutual Group.

The witnesses for the Distributors could not recall signing such cheques; however, one admitted that his recollection generally was hazy and the other admitted that it was possible that he had signed such cheques.

It was not contested that the Distributors made other employer remittances by way of cheques prepared as described above, such as Canada Pension Plan, Employment Insurance and other employer-funded benefits.

Accordingly, the evidence supports the determination that the Distributors were contributing to the Plan.

The question then turns to whether the Distributors agreed to participate in the Plan.

With respect to this issue some facts are troubling. The evidence suggests that not only did the Distributors not sign elections as required under the 1984 Plan text they never even received a copy of the Plan text. Rather the Distributors only received annual statements for delivery to their employees and cheques for payment of contributions to the Plan.

The provision of the Distributor Agreement stated above is not at all clear with respect to the obligations that the Distributors under the Plan. However, the Distributors had been part of the Pension Plan since 1959. The Distributors could decline to participate in the Pension Plan, and some in fact did so. Eventually, the topic of the Pension Plan came up at the Advisory Board of Dustbane and Distributors, in the context of the Distributors' desire to terminate or renegotiate their Services Agreement with Dustbane. At this point, some Distributors specifically wanted to remain in the Plan (while not paying the 5% fee and not participating in other benefits). Dustbane was not prepared to agree to this and the decision was made that the Distributors would then cease to participate in the Plan. I disagree with the Majority Decision as to whether this decision was made unilaterally.

One Distributor witness did not recall receiving monthly statements setting out employer contributions. However, he admitted in cross-examination that he was aware when he bought the shares of his company that company made Canada Pension Plan, Employment Insurance and "group insurance" remittances, and that at least by 1983, he was aware his employees were participating in the Plan, his company was being charged for regular employer contributions for the Plan, and that he was "content" with this participation.

Accordingly, while the elections reference in the 1984 Plan text were never completed, and the Distributors do not seem to have been provided with Plan documents as would have been appropriate, it does appear that a 31 year course of participation in the Plan, including the payment of retiree benefits during that time, establish an agreement to participate in the Plan.

In summary, having found that the Distributors were employers contributing to the Plan by agreement the Plan was a multi-employer plan within the meaning of s.1 of the Act.

This Tribunal's decision in *The Canadian Union of Public Employees, Locals No. 1144 and 1590 ("CUPE") and Superintendent of Pensions, the Sisters of St. Joseph for the Diocese of Toronto and Upper Canada (the "Sisters")*, *St. Michael's Hospital, St. Joseph's Health Centre and Provident Centre (the "Hospitals")* (1998) No. XDEC-42, 12/18/98, (Financial Services Tribunal) ("*Sisters of St. Joseph*") is readily distinguishable from the present case.

In *Sisters of St. Joseph*, the Tribunal found that the Sisters of St. Joseph Plan was not a multi-employer pension plan but was established and maintained only for one employer, the Sisters. The Tribunal reached its conclusion on the basis that there were no separate corporate entities – only divisions of one entity and the Sisters:

- (a) owned and operated all bank accounts from which the Hospital's payroll and benefits costs were met;
- (b) appointed signing officer, auditors and board members to the Hospitals;
- (c) approved the by-laws of the Hospital;
- (d) owned the Hospital properties;
- (e) retained the power to own and operate each Hospital;
- (f) controlled bank accounts from which employee remuneration was paid; and
- (g) had the authority to transfer the assets of one Hospital to satisfy the debts of another.

The Majority Decision cites a number of provisions of the Act which relate to multi-employer plans. The Act and the Regulations thereunder do not provide a systematic code for understanding the intended treatment of multi-employer plans. Rather the legislation contains a series of apparently unconnected provisions that seem to have been intended to address only limited concerns. Multi-employer plans in the collectively bargained arena have different concerns than those in the present case. It would be preferable that the legislation would be amended to provide a more systematic consideration of these plans and to consider the different contexts in which these plans may arise. However, the circumstances under consideration in this matter do not appear to justify overriding the appropriate legal conclusion regarding who was the employer in relation to the relevant employees and who is responsible for the liabilities of the pension plan.

- (b) If the answer to issue (a) is "yes", who is required to fund the deficit in the Plan's fund?

While the Plan documentation could have been clearer on this issue, it would seem appropriate that given that the Distributors were employers participating in the Plan that they would be liable to the deficit allocable to their employees.

No evidence was adduced in this proceeding as to the proper allocation of the deficit and therefore we make no finding on this issue.

We do, however, note two matters arising from the evidence in this matter which are troubling and the parties may wish to consider further.

Firstly, it is unclear whether the Distributors agreed to pay the actuarial fees related to the partial wind-up. No evidence of such agreement was adduced. Prior to the wind-up all actuarial fees seemed to have been paid for out of the 5% service fee quoted above. In March

1990, Dustbane advised the Distributors by letter that the wind-up may result in financial obligations:

“As you are aware, severing from the Dustbane pension plan may result in financial obligations on the part of the Distributor. Our actuarial consultants are presently in the process of preparing an estimate of what each Distributor’s obligations will be at June 1, 1990. Since the final figures can change depending on the options chosen by your employees, it will not be possible to know the exact amounts until after June 1, 1990.”

However, that statement is quite vague as to the source of the financial obligations and certainly no mention is expressly made of the actuarial fees until most of those fees had been incurred.

Secondly, the evidence raises issues as to whether Dustbane properly supplied information regarding the Plan to Distributors and plan members, even upon request.

- (c) Does the Tribunal have a jurisdiction to take into account any delay on the part of the regulator in its determination of the above issues?

I agreed with the Majority Decision with respect to this issue.

B. THE DISPOSITION

In light of our conclusions, I would order the Superintendent to refrain from carrying out the proposal contained in the Notice of Proposal.

I agree with the Majority Decision with respect to the issue of costs.

DATED at Toronto, this 15th day of February, 2001.

“Kathryn M. Bush
Kathryn M. Bush
Vice-Chair of the Tribunal and
Chair of the Panel

Tab 16



Dustbane Enterprises Limited v. Ontario (Superintendent of Financial Services), [2002] O.J. No. 2943

Ontario Judgments

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario
Farley, Pardu and Lax JJ.
June 7, 2002.
Court File No. 219/01

[2002] O.J. No. 2943

Between Dustbane Enterprises Limited, applicant, and Superintendent of Financial Services et al., respondent
(8 paras.)

Counsel

Andrew Lokan, for the applicant. No counsel mentioned for the respondent.

The following judgment was delivered by

THE COURT (endorsement)

1 This is an appeal from a decision of the Financial Services Tribunal, including that the appellant Dustbane was an "employer" within the meaning of s. 1 of the Pension Benefits Act R.S.O. 1990 and therefore liable to cover a deficit arising on a partial winding up of a pension plan.

2 The issue of whether the appellant was an employer was not a "jurisdictional" fact. The real issue before the tribunal was whether the appellant or its distributors should be liable for the deficit. This determination did call on the tribunal to utilize its expertise in the domain of pension administration. Determining who was an "employer" in this context may raise different issues from any determination of who was the employer in the conventional sense. There is no privative clause. The appropriate standard of review with respect to this issue in our view is reasonableness simpliciter.

3 The tribunal (majority) concluded "It is clear that Dustbane acted, until the possibility arose of transferring the responsibility for partial wind up liabilities to the Distributors, as if it were the sole employer and sole administrator of the Dustbane Pension Plan". This finding was reasonably open to the tribunal on the evidence before it, and given that finding it was reasonable to conclude that the appellant was effectively estopped from denying it was the employer for the purposes of the Pension Benefits Act. The need to protect employees from pension deficits was an appropriate factor to consider.

4 It appears that the majority adopted the purposive approach outlined by the Supreme Court of Canada in its recent decisions of *Rizzo*, [1998] 1 S.C.R. 27, and *Bell ExpressVu*, [2002] S.C.J. No. 43. We agree for the most part with the reasons given by the majority of the tribunal; the possible confusion about the breakdown of cheques for employee benefits did not appear to affect the reasoning.

5 On the issue of delay, it appears that the appellant was responsible for a significant part of the delay and we are not at all convinced that the fairness of the hearing was adversely affected by the passage of time. While the

deficit has grown because the plan has not earned enough to offset the interest actuarially determined to accrue on the deficit, the appellant has had the use of the funds arising from during this period. This growth in the deficit does not in our view amount to significant prejudice, such that fixing the appellant with liability would amount to an abuse of process.

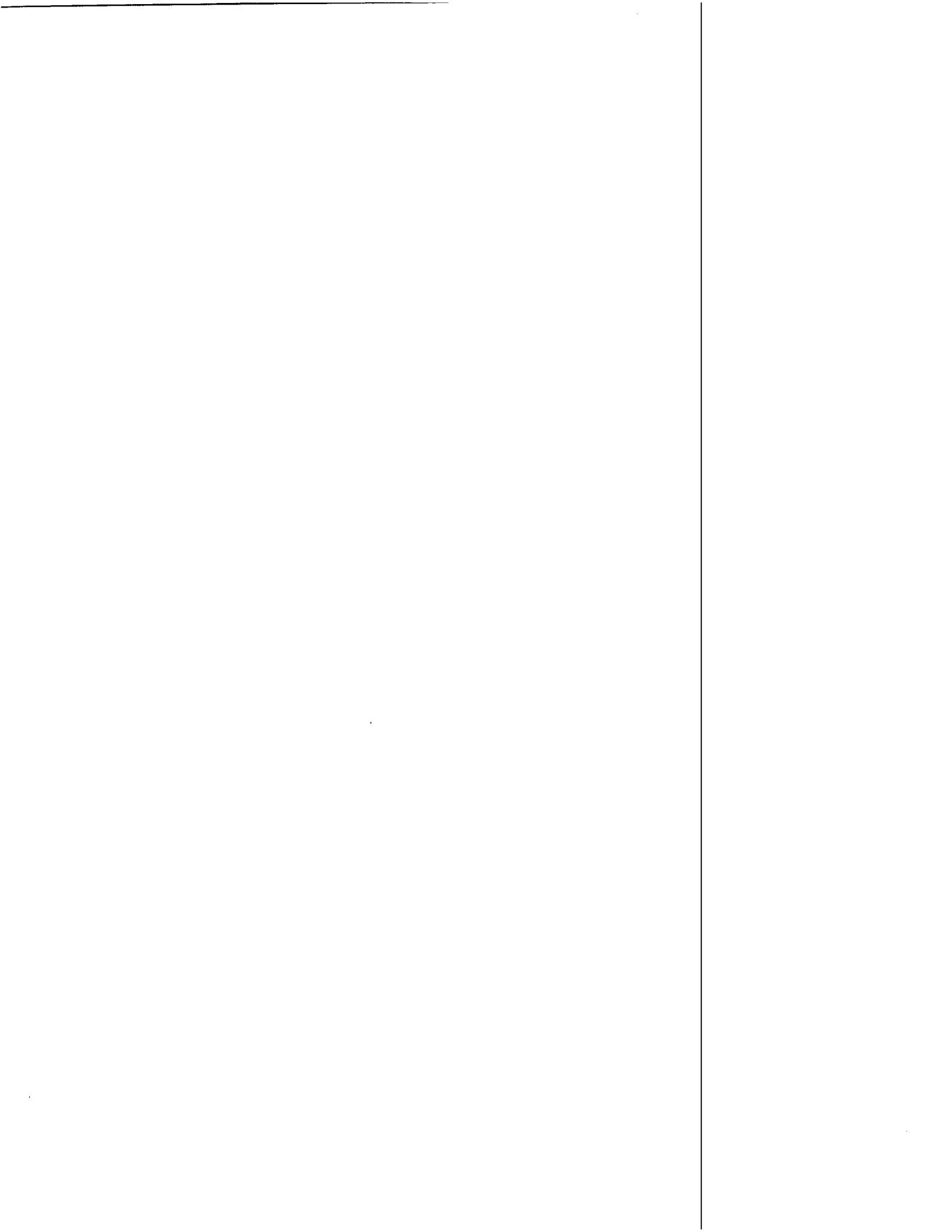
6 It was appropriate for the tribunal to consider the welfare of the employees. All members of the tribunal agreed that the delay did not justify relieving the appellants of responsibility for the deficit and that conclusion was reasonable.

7 Accordingly the appeal is dismissed.

8 Costs to the respondents 548264 Ont. Inc. and 818787 Ont. Ltd. in the amount of \$15000 plus GST plus disbursement of \$133.95.

FARLEY J.
PARDU J.
LAX J.

Tab 17



Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

N° du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «LNE») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

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

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

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40a de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. 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. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40a sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

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

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

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40a sont examinés dans leur contexte global, les termes «l'employeur licencié» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40a de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtlinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40a(1) [rep. & sub. *ibid.*, s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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[1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Machtlinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. c. Vasil*, [1981] 1 R.C.S. 469; *Paul c. La Reine*, [1982] 1 R.C.S. 621; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025.

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Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I-11], art. 10, 17.
Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 74(1), 75(1).
Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40a(1) [abr. & rempl. *ibid.*, art. 5(1)].

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Christie, Innis, Geoffrey England and Brent Cotter. *Employment Law in Canada*, 2nd ed. Toronto: Butterworths, 1993.
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Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and Kathleen Martin, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

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

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. n° 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et Kathleen Martin, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur.

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

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

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

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

Conformément à l'ordonnance de séquestre, l'intimée, Zittler, Siblín & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «LNE»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 \$). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

- (a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
- (b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la «LF») et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la «LNE»).

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7...

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi*.

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

- a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;
- b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

- | | |
|--|---|
| <p>(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;</p> <p>(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;</p> <p>(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;</p> <p>(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;</p> <p>(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;</p> <p>(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more, and such notice has expired.</p> | <p>c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;</p> <p>d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;</p> <p>e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;</p> <p>f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;</p> <p>g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;</p> <p>h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus, et avant le terme de la période de ce préavis.</p> |
|--|---|

(7) Where the employment of an employee is terminated contrary to this section,

- (a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

(7) Si un employé est licencié contrairement au présent article:

- a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

40a . . .

(1a) Where,

- (a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or
- (b) one or more employees have their employment terminated by an employer with a payroll of \$2.5 million or more,

40a . . .

[TRANSLATION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

- a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;
- b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981,
S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981,
L.O. 1981, ch. 22

[TRANSLATION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40a de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1^{er} janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujéti à la date de la faillite, ou auxquels il peut devenir assujéti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujéti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

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B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

¹³ Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as “[n]o employer shall terminate the employment of an employee” (s. 40(1)), “the notice required by an employer to terminate the employment” (s. 40(2)), and “[a]n employer who has terminated or who proposes to terminate the employment of employees” (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase “employees have their employment terminated by an employer”. Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

Au nom d’une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s’arrêtant sur le libellé des dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l’indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu’un employeur donne pour licencier» (par. 40(2)) et les «employés qu’un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l’indemnité de cessation d’emploi, il a cité l’al. 40a(1)a), à la p. 391, lequel contient l’expression «l’employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l’obligation d’accorder une indemnité de licenciement et une indemnité de cessation d’emploi aux cas où l’employeur licencie des employés. Selon lui, la cessation d’emploi résultant de l’effet de la loi, notamment de la faillite, n’entraîne pas l’application de la *LNE*.

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

À l’appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d’appel) a statué que les dispositions relatives à l’indemnité de licenciement de la *LNE* n’étaient pas conçues pour s’appliquer à l’employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l’appui de la proposition selon laquelle la faillite d’une compagnie à la demande d’un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

[TRADUCTION] Le libellé clair des art. 40 et 40a ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d’emploi que si l’employeur licencie l’employé. En l’espèce, la cessation d’emploi n’est pas le fait de l’employeur, elle résulte d’une ordonnance de séquestre rendue à l’encontre de Rizzo le 14 avril 1989, à la suite d’une pétition présentée par l’un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

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

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

4. Issues

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

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1*a*) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

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the words, "Where . . . fifty or more employees have their employment terminated by an employer. . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

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

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

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licier un employé . . . » Le paragraphe 40a(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . . » Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à décharger l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3^e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2^e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

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

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

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

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

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of “. . . the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2^e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l’interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

[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.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l’approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

Je m’appuie également sur l’art. 10 de la *Loi d’interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s’interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

Bien que la Cour d’appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n’a pas accordé suffisamment d’attention à l’économie de la *LNE*, à son objet ni à l’intention du législateur; le contexte des mots en cause n’a pas non plus été pris en compte adéquatement. Je passe maintenant à l’analyse de ces questions.

Dans l’arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l’importance que notre société accorde à l’emploi et le rôle fondamental qu’il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C’est dans ce contexte que les juges majoritaires dans l’arrêt *Machtinger* ont défini, à la p. 1003, l’objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

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certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, "... an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

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

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

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«... une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a, qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2^e éd. 1993), aux pp. 572 à 581.)

De même, l'art. 40a, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

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

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

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40a de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes, op. cit.*, à la p. 88).

Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

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until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

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

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

2. . . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40a, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1^{er} janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40a de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1^{er} janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

... any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *E.S.A.* ... it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

This interpretation is also consistent with statements made by the Minister of Labour at the time

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40a, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

[TRADUCTION] ... tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la *L.N.E.* [...] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

Cette interprétation est également compatible avec les déclarations faites par le ministre du

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he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

... the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

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Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

... until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

[TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.

... les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1^{er} janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1^{re} sess., 32^e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

[TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1^{re} sess., 32^e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

... jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [...] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la legislature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40a de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

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amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats, supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd., supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch, supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40a of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40a de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

mots «l'employeur licencié» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inequitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

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74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, “[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law”. As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43

I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo’s former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed with costs.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l’emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d’emploi résulte de l’effet de la loi à la suite de la faillite de l’employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l’art. 17 de la *Loi d’interprétation* dispose que «[l]’abrogation ou la modification d’une loi n’est pas réputée constituer ou impliquer une déclaration portant sur l’état antérieur du droit», je précise que la modification apportée subséquemment à la loi n’a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Dispositif et dépens

Je suis d’avis d’accueillir le pourvoi et d’annuler le premier paragraphe de l’ordonnance de la Cour d’appel. Je suis d’avis d’y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d’indemnité de licenciement (y compris la paie de vacances due) et d’indemnité de cessation d’emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n’ayant produit aucun élément de preuve concernant les efforts qu’il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d’autorisation de pourvoi auprès de notre Cour en leur nom, je suis d’avis d’ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d’avis de ne pas modifier les ordonnances des juridictions inférieures à l’égard des dépens.

Pourvoi accueilli avec dépens.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs de l’intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureur du ministère du Travail de la province d’Ontario, Direction des normes d’emploi: Le procureur général de l’Ontario, Toronto.

Tab 18



**Bell ExpressVu Limited
Partnership** *Appellante*

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 *Intervenants*

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° du greffe : 28227.

2001 : 4 décembre; 2002 : 26 avril.

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

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

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

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

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).

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).

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

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.

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

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

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

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 résidents 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 extra-territorial de certains pouvoirs. Le législateur entendait interdire de manière absolue aux résidents 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.

Cases Cited

Not followed: *R. v. Love* (1997), 117 Man. R. (2d) 123; *R. v. Ereiser* (1997), 156 Sask. R. 71; *R. v. LeBlanc*, [1997] N.S.J. No. 476 (QL); *R. v. Thériault*, [2000] R.J.Q. 2736, aff'd Sup. Ct. Drummondville, No. 405-36-000044-003, June 13, 2001; *R. v. Gregory Électronique Inc.*, [2000] Q.J. No. 4923 (QL), aff'd [2001] Q.J. No. 4925 (QL); *R. v. S.D.S. Satellite Inc.*, C.Q. Laval, No. 540-73-000055-980, October 31, 2000; *R. v. Branton* (2001), 53 O.R. (3d) 737; **referred to:** *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (QL), aff'd (1995), 106 Man. R. (2d) 37, leave to appeal ref'd (1996), 110 Man. R. (2d) 153; *R. v. King*, [1996] N.B.J. No. 449 (QL), rev'd (1997), 187 N.B.R. (2d) 185; *R. v. Knibb* (1997), 198 A.R. 161, aff'd [1998] A.J. No. 628 (QL); *ExpressVu Inc. v. NII Norsat International Inc.*, [1998] 1 F.C. 245, aff'd (1997), 222 N.R. 213; *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628; *Canada (Procureure générale) v. Pearlman*, [2001] R.J.Q. 2026; *Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396; *R. v. Scullion*, [2001] R.J.Q. 2018; *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Stoddard v. Watson*, [1993] 2 S.C.R. 1069; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108; *R. v. Goulis* (1981), 33 O.R. (2d) 55; *R. v. Hasselwander*, [1993] 2 S.C.R. 398; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53; *Westminster Bank Ltd. v. Zang*, [1966] A.C. 182; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Corbiere v. Canada (Minister of Indian*

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.

Jurisprudence

Arrêts non suivis : *R. c. Love* (1997), 117 Man. R. (2d) 123; *R. c. Ereiser* (1997), 156 Sask. R. 71; *R. c. LeBlanc*, [1997] N.S.J. No. 476 (QL); *R. c. Thériault*, [2000] R.J.Q. 2736, conf. par C.S. Drummondville, n° 405-36-000044-003, 13 juin 2001; *R. c. Gregory Électronique Inc.*, [2000] J.Q. n° 4923 (QL), conf. par [2001] J.Q. n° 4925 (QL); *R. c. S.D.S. Satellite Inc.*, C.Q. Laval, n° 540-73-000055-980, 31 octobre 2000; *R. c. Branton* (2001), 53 O.R. (3d) 737; **arrêts mentionnés :** *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554; *R. c. Open Sky Inc.*, [1994] M.J. No. 734 (QL), conf. par (1995), 106 Man. R. (2d) 37, autorisation d'appel refusée (1996), 110 Man. R. (2d) 153; *R. c. King*, [1996] N.B.J. No. 449 (QL), inf. par (1997), 187 N.R.-B. (2d) 185; *R. c. Knibb* (1997), 198 A.R. 161, conf. par [1998] A.J. No. 628 (QL); *ExpressVu Inc. c. NII Norsat International Inc.*, [1998] 1 C.F. 245, conf. par [1997] A.C.F. n° 1563 (QL); *WIC Premium Television Ltd. c. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628; *Canada (Procureure générale) c. Pearlman*, [2001] R.J.Q. 2026; *Ryan c. 361779 Alberta Ltd.* (1997), 208 A.R. 396; *R. c. Scullion*, [2001] R.J.Q. 2018; *Stuart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536; *Québec (Communauté urbaine) c. Corp. Notre-Dame de Bon-Secours*, [1994] 3 R.C.S. 3; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *R. c. Gladue*, [1999] 1 R.C.S. 688; *R. c. Araujo*, [2000] 2 R.C.S. 992, 2000 CSC 65; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2; *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3; *R. c. Ulybel Enterprises Ltd.*, [2001] 2 R.C.S. 867, 2001 CSC 56; *Stoddard c. Watson*, [1993] 2 R.C.S. 1069; *Pointe-Claire (Ville) c. Québec (Tribunal du travail)*, [1997] 1 R.C.S. 1015; *Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108; *R. c. Goulis* (1981), 33 O.R. (2d) 55; *R. c. Hasselwander*, [1993] 2 R.C.S. 398; *R. c. Russell*, [2001] 2 R.C.S. 804, 2001 CSC 53; *Westminster Bank Ltd. c. Zang*, [1966] A.C. 182; *CanadianOxy Chemicals Ltd. c. Canada (Procureur général)*, [1999] 1 R.C.S. 743; *Québec (Procureur général) c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831;

and Northern Affairs), [1999] 2 S.C.R. 203; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *R. v. Gayle* (2001), 54 O.R. (3d) 36, leave to appeal to S.C.C. refused, [2002] 1 S.C.R. vii; *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Baron v. Canada*, [1993] 1 S.C.R. 416; *R. v. Mills*, [1999] 3 S.C.R. 668; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Lucas*, [1998] 1 S.C.R. 439; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

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Radiocommunication Act, R.S.C. 1985, c. R-2, ss. 2, "broadcasting", "encrypted" [ad. 1991, c. 11, s. 81], "lawful distributor" [idem], "radiocommunication" or "radio", "subscription programming signal" [idem], 3(3)(a), (b) [rep. & sub. 1989, c. 17, s. 4], (c) [idem; am. 1996, c. 31, s. 94], 5(1)(a), 9(1)(c) [ad. 1989, c. 17, s. 6; am. 1991, c. 11, s. 83], (e) [ad. 1991, c. 11, s. 83], 10(1)(b) [ad. 1989, c. 17, s. 6], (2.1) [ad. 1991, c. 11, s. 84], (2.5) [idem], 18(1) [idem, s. 85], (6) [idem].
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Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42, art. 21 [abr. 1994, ch. 47, art. 59; aj. 1997, ch. 24, art. 14], 31(2) [abr. ch. 10 (4^e suppl.), art. 7; aj. 1988, ch. 65, art. 63; art. 28.01 devient l'art. 31, 1997, ch. 24, art. 16; mod. *idem*, art. 52(1)a)].
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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 Congress Iberoamerican du Canada.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

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*

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

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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 Congress 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.

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

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.

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

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

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

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 sans 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.

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.

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 résident des États-Unis. La carte à puce du client est ensuite activée.

Dans le passé, les intimés offraient des services analogues à des résidents 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.

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 résidents 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 la juge Huddart rédigeant des motifs de dissidence.

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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 radio-électriques 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.

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,

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 efficaces, 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.

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.

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

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. Les décisions des juridictions inférieures

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

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.

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).

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).

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.

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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.

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).

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*

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.

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).

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. 2b) 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 :

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. 2b) 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. AnalysisA. *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'analyseA. *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 (1^{re} inst.), conf. par [1997] A.C.F. n° 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, n° 405-36-000044-003, 13 juin 2001 (*sub nom. R. c. D'Argy*); *R. c. Gregory Électronique Inc.*, [2000] J.Q. n° 4923 (QL) (C.Q.), conf. par [2001] J.Q. n° 4925 (QL) (C.S.); *R. c. S.D.S. Satellite Inc.*, C.Q. Laval, n° 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.).

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.

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.

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

(1) Principles of Statutory Interpretation

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

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

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

27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like

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* (2^e 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, *Stuart 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.)

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.)

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

can. 1, p. 6, [TRANSDUCTION] « 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.)

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 ».)

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 [TRANSDUCTION] « 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 ».

Voilà 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 extra-territorial 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*

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.

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’appellante demande l’interdiction se produit entièrement au Canada.

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 »

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“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* (2^e 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.

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.

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

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unauthorized retransmission within Canada) and only concerns decrypting that occurs in the s. 3(3) locations, this does not give rise to any extraterritorial 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. »

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 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.

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 « [I]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

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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.

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.

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

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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* (3^e 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?

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.

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’acquiescent 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.

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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.

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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.

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.

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 »*

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.

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 résidents 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 résidents 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.

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.

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.

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[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).

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).

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.

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.

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.

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.

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.

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:

[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

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.

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.

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* » :

[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

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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 over-arching 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.

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.

VII. Disposition

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.

Appeal allowed with costs.

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

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

avantages d'un débat devant les tribunaux relative-ment 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.

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. Dispositif

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.

Pourvoi accueilli avec dépens.

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

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

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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.

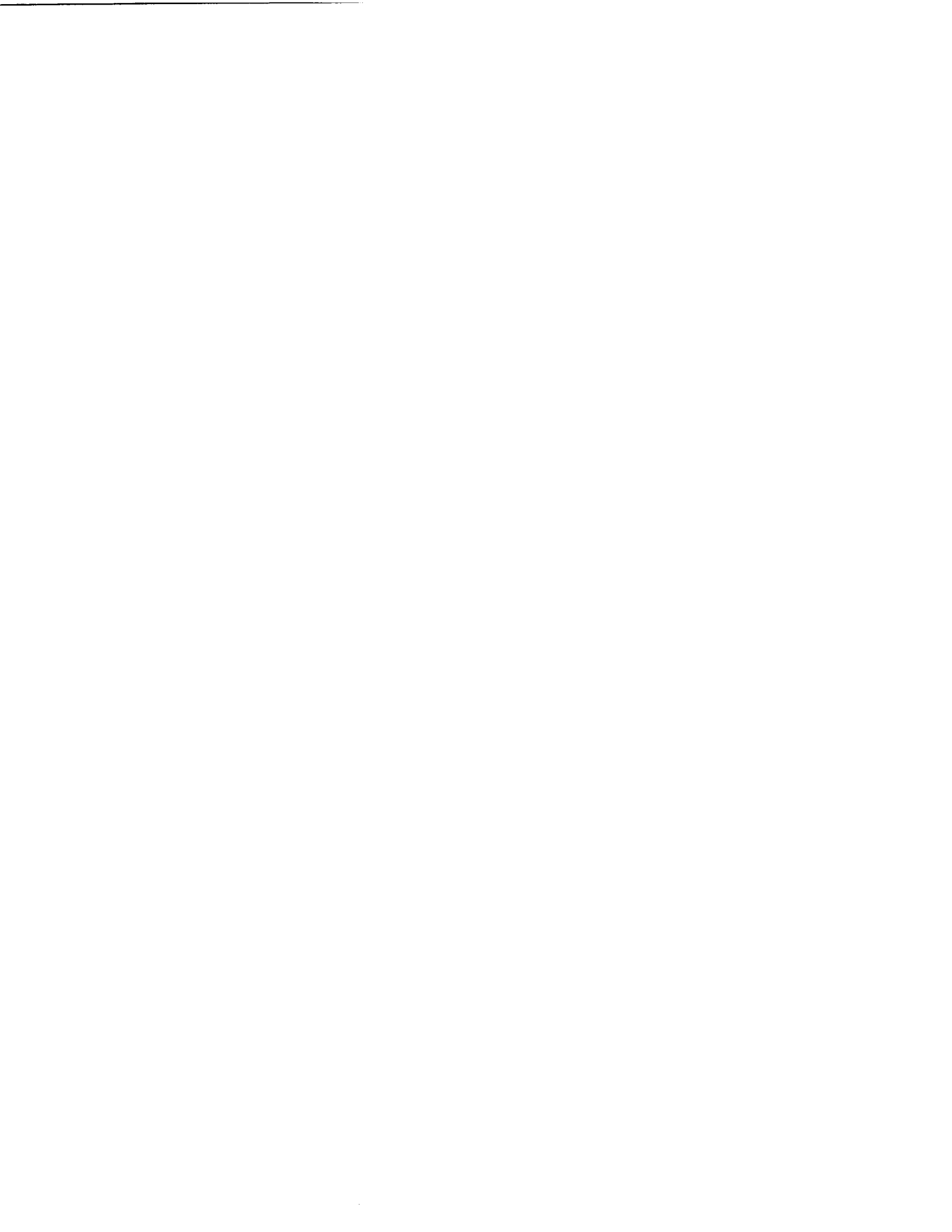
Procureurs de l'intervenante l'Association canadienne des distributeurs de films : Sim, Hughes, Ashton & McKay, Toronto.

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.

Tab 19



Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in
Right of Ontario et al.*

Alouche v. Landing Strip Inc. et al.

[Indexed as: Downtown Eatery (1993) Ltd. v. Ontario]

54 O.R. (3d) 161
[2001] O.J. No. 1879
2001 CanLII 8538
Docket No. C33989

Court of Appeal for Ontario,
McMurtry C.J.O., Borins and MacPherson JJ.A.
May 22, 2001

*Application for leave to appeal to the Supreme Court of
Canada was dismissed with costs January 31, 2002 (Gonthier,
Major and Binnie JJ.). S.C.C. File No. 28744. S.C.C. Bulletin,
2002, p. 155.

Corporations--Oppression--Employee brought successful action
for damages for wrongful dismissal--Company which employed him
ceased to do business after action commenced--Employee unable
to recover judgment--Employee sought oppression remedy on basis
that corporate reorganization oppressive or unfairly
prejudicial to him--Trial judge erred in dismissing claim on
basis that reorganization not undertaken for purpose of
depriving employee of recovery of judgment--Oppressive conduct
need not be undertaken with intention of harming complainant
--Acts of directors in causing company to go out of business
were unfairly prejudicial to or unfairly disregarded employee's
interests as person who stood to obtain judgment against
company--Business Corporations Act, R.S.O. 1990, c. B.16, s.
248.

Actions--Bars--Issue estoppel--Employee brought action for damages for wrongful dismissal--Employer went out of business after action commenced--Employee moved to add directors of company as defendants but withdrew motion to avoid delaying trial--Employee obtained judgment against company but was unable to recover against company--Employee subsequently asserted claim against directors' other companies on basis of common employer doctrine and against directors personally --Employee estopped from asserting claim against directors --Common employer doctrine not litigated in first action --Doctrine of estoppel did not bar claim against companies.

Employment--Wrongful dismissal--Common employers--Employee worked as manager of nightclub--Nightclub owned and operated through consortium of companies--Employee paid by B Inc.-- Employee wrongfully dismissed--Employee obtained judgment against B Inc. but was unable to recover on it--B Inc. had ceased to do business--Common employer doctrine applied --Judgment could be enforced against consortium of companies which owned and operated nightclub and against successor or merged companies created by corporate reorganization.

HG and BG owned and operated two nightclubs through a consortium of companies. HG hired A in 1992 as manager of one of the nightclubs. A received his paychecks from B Inc. A was dismissed in 1993. He brought an action for damages for wrongful dismissal against B Inc. Several years after the action was commenced, there was a major reorganization of HG and BG's companies. B Inc. ceased to do business. A moved to add HG and BG as co-defendants to his claim against B Inc. Faced with a potential adjournment of the trial to permit HG and BG to retain counsel, A withdrew the motion. A was successful at trial, and judgment in the amount of \$59,906.76 was granted in his favour. B Inc. paid him nothing pursuant to the judgment. Sheriffs attended at the nightclub premises and, in purported execution of the judgment, seized \$1,855 in cash. D Ltd., claiming that the money belonged to it, brought an action against A. A defended the action and counterclaimed against all of the companies controlled by HG and BG and against BG and HG personally, basing his claim on the common employer doctrine and the oppression remedy under the Ontario

Business Corporations Act. The trial judge dismissed the counterclaim. On the common employer issue, he rejected A's submissions both on the merits and because A, having been content in his wrongful dismissal action to allege that B Inc. was his employer and to be bound by that conclusion, was estopped from now alleging a different or expanded employment obligation. The trial judge also held that an oppression remedy was not appropriate because the reorganization of the HG-BG companies was not undertaken for the purpose of depriving A of recovery of his judgment against B Inc. A appealed.

Held, the appeal should be allowed.

The issue which A considered on the eve of his wrongful dismissal trial was whether to sue HG and BG in their personal capacities as potential employers because of his concern that B Inc., the corporate entity which he regarded as his employer because it paid him, might have no assets. He made a conscious decision not to join HG and BG in the wrongful dismissal action because it would have delayed the trial of that action. The trial judge did not err in concluding that A was estopped from suing BG and HG personally as potential employers in his subsequent action. However, the common employer issue was not considered by A on the eve of the wrongful dismissal trial. The common employer issue raised by A's counterclaim against the corporations did not constitute relitigating an issue. The common employer issue as it related to the corporations should be determined on the merits.

When A was dismissed in 1993, there was a highly integrated or seamless group of companies which together operated all aspects of the nightclub. While an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. A was wrongfully dismissed, and his employer had to meet its legal responsibility to compensate him for its unlawful conduct. The definition of "employer" in this simple and common scenario should be one that recognizes the complexity of modern corporate structures but does not permit that complexity to defeat the legitimate entitlements of

wrongfully dismissed employers. The trial judge's focus on the absence of a contract between A and any of the potential common employers and on the fact that there was no holding out by the employer of joint and several liability of more than one company was too narrow. A's true employer in 1993 was the consortium of HG and BG companies which operated the nightclub.

The 1996 corporate reorganization was undertaken for business reasons unrelated to A's action. However, A's judgment should be enforced against the successor or merged companies which were created by the reorganization.

In dismissing A's claim for an oppression remedy, the trial judge found that the amalgamation and reorganization were not undertaken for the purpose of depriving A of recovery of judgment. The trial judge failed to appreciate that the oppressive conduct that causes harm to a complainant need not be undertaken with the intention of harming the complainant. Provided that it is established that a complainant has a reasonable expectation that a company's affairs will be conducted with a view to protecting his interests, the conduct complained of need not be undertaken with the intention of harming the complainant. If the effect of the conduct results in harm to the complainant, recovery under s. 248(2) may follow.

There was no question that the acts of HG and BG, as the directors of B Inc., in causing the company to go out of business and transferring its assets to other companies within the group of companies they owned and operated in 1996 in the face of a trial scheduled to begin a few months later, effected a result that was unfairly prejudicial to, or that unfairly disregarded the interests of, A as a person who stood to obtain a judgment against B Inc. When B Inc. went out of business, it was profitable, and its accumulated profits were available to satisfy any claims arising from employment contracts. HG's evidence indicated that, although he was aware that A's pending claim might result in a judgment against B Inc., he took no steps to ensure that B Inc. retained a reserve to meet that contingency. A was entitled to be protected, and HG and BG had an obligation to ensure that such protection continued. A was

entitled to an oppression remedy against HG and BG.

Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321, 168 D.L.R. (4th) 270, 40 C.C.E.L. (2d) 1, 99 C.L.L.C. 210-013 (C.A.), affg (1997), 30 C.C.E.L. (2d) 123 (Ont. Gen. Div.); Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc. (1998), 40 O.R. (3d) 563, 162 D.L.R. (4th) 367, 43 B.L.R. (2d) 155 (C.A.), varg (1995), 131 D.L.R. (4th) 399, 25 B.L.R. (2d) 179 (Ont. Gen. Div.); Sinclair v. Dover Engineering Services Ltd. (1988), 49 D.L.R. (4th) 297 (B.C.C.A.), affg (1987), 11 B.C.L.R. (2d) 176 (S.C.), apld

Other cases referred to

Bagby v. Gustavson International Drilling Co. (1980), 24 A.R. 181 (C.A.), varg (1979), 20 A.R. 244 (T.D.); First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1989), 71 Alta. L.R. (2d) 61, [1990] 2 W.W.R. 670, 45 B.L.R. 110 (C.A.), staying (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Q.B.) (sub nom. 315888 v. First Ed. Place); Gray v. Standard Trustco Ltd. (1994), 29 C.B.R. (3d) 22, 8 C.C.E.L. (2d) 46 (Ont. Gen. Div.); Jacobs v. Harbour Canoe Club Inc., [1999] B.C.J. No. 2188 (S.C.); Johnston v. Topolinski (1988), 23 C.C.E.L. 285 (Ont. Dist. Ct.); Jones v. CAE Industries Ltd. (1991), 40 C.C.E.L. 236 (Ont. Gen. Div.); MacPhail v. Tackama Forest Products Ltd. (1993), 86 B.C.L.R. (2d) 218, [1994] 3 W.W.R. 36, 11 B.L.R. (2d) 19, 50 C.C.E.L. 136 (S.C.); Olson v. Sprung Instant Greenhouses Ltd. (1985), 64 A.R. 321, 41 Alta. L.R. (2d) 325, 12 C.C.E.L. 8 (Q.B.)

Statutes referred to

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 245, 248
Employment Standards Act, R.S.O. 1990, c. E.14, s. 12(1)

Authorities referred to

Ball, S., Canadian Employment Law (Aurora: Canada Law Book, 1999)

Nicholls, C.C., "Liability of Corporate Officers and Directors to Third Parties" (2001), 35 C.B.L.J. 1

APPEAL from a judgment of Campbell J. (2000), 2 C.C.E.L. (3d) 66 dismissing a counterclaim for oppression remedy and to recover for an unsatisfied judgment.

J. Gardner Hodder, for appellant.
John Conway, for respondents.

The judgment of the court was delivered by

BORINS and MACPHERSON JJ.A.:--

A. Introduction

[1] In his valuable text, *Canadian Employment Law* (Aurora: Canada Law Book, 1999), Stacey Ball states, at p. 4-1:

The courts now recognize that, for purposes of determining the contractual and fiduciary obligations which are owed by employers and employees, an individual can have more than one employer. The courts now regard the employment relationship as more than a matter of form and technical corporate structure. Consequently, the present law states that an individual may be employed by a number of different companies at the same time.

[2] The mechanism whereby the law concludes that an employee may be employed by more than one company at the same time is the common employer doctrine. The doctrine has a well-recognized statutory pedigree in most jurisdictions. For example, in Ontario, s. 12(1) of the *Employment Standards Act*, R.S.O. 1990, c. E.14, deems associated or related businesses to be "one employer" for the purpose of protecting the benefits to which employees are entitled under the Act.

[3] A major issue in this appeal is the definition and application of the common employer doctrine in a common law context. A dismissed employee sued his employer for wrongful

dismissal. Following a trial, he was awarded substantial damages. Unfortunately, the employer company had no assets and consequently the employee was unable to enforce his judgment. In a subsequent action, the employee sued related companies and the two main principals of all the companies in an attempt to widen its net of potential sources of recovery. His principal legal submission in support of his attempt was, and is on this appeal, the common employer doctrine. In Canadian Employment Law, Mr. Ball states that "[t]he finding that more than one corporation is the employer may be a benefit when parts of the corporate group are more solvent than others" (p. 4-1). That is precisely the benefit the dismissed employee seeks to achieve in this litigation.

[4] A second important issue in this appeal is the availability of an oppression remedy to a dismissed employee in the context of a corporate reorganization shortly before a wrongful dismissal trial which has the effect of denying the employee any recovery on a judgment he obtains at the trial.

B. Facts

(1) The parties and the events

[5] In 1992, the respondents Herman Grad ("Grad") and Ben Grosman ("Grosman") were in the nightclub business in Toronto. They owned and operated two nightclubs, The Landing Strip at 191 Carlingview Drive and For Your Eyes Only at 557/563 King Street West.

[6] The appellant, Joseph Alouche ("Alouche"), was born in Egypt and came to Canada in 1974. He attended the Toronto School of Business, took courses in hotel management and received a diploma. He also took correspondence courses relating to the hospitality industry and computers.

[7] In December 1992, Grad offered Alouche a position as manager of the nightclub For Your Eyes Only. The only entity specifically identified in the written employment contract was For Your Eyes Only. However, the contract also provided that Alouche would receive the health care and insurance benefits

available "in our sister organization", which was not identified by name.

[8] Alouche commenced work on December 29, 1992. During the next few months, he received his pay cheques from Best Beaver Management Inc. ("Best Beaver"), a company controlled by Grad and Grosman. In May 1993, Alouche was sent a formal Notice of Discipline on the letterhead of For Your Eyes Only for committing several infractions, including:

- the employee, while soliciting in excess of \$1,000.00 gratuity only generated sales of \$250.00 for the employer.
- the employee allowed numerous waitresses to abandon their assigned sections to solicit gratuities in the amount of \$2,800.00.

[9] On June 15, 1993, Alouche was dismissed. On October 13, 1993, he commenced an action against Best Beaver. In subsequent proceedings which form the basis for this appeal, Alouche explained the choice of Best Beaver as the defendant in the first action: "I sued Best Beaver . . . because the paycheque that they gave me in For Your Eyes Only, it says Best Beaver Management Inc."

[10] In the spring of 1996, there was a major reorganization of the Grad-Grosman companies. Best Beaver ceased to do business. In July 1996, Grad discharged Best Beaver's counsel. Shortly before the start of the trial in his wrongful dismissal action in August 1996, Alouche, worried about recovery if successful in the action, moved to add Grad and Grosman as co-defendants to his claim against Best Beaver. Faced with a potential adjournment of the trial to permit Grad and Grosman to retain counsel, Alouche withdrew the motion.

[11] The trial proceeded with Best Beaver as the only defendant. Grad, a director of Best Beaver, represented it throughout the trial. The trial judge, Festeryga J., found in favour of Alouche. He awarded Alouche damages of \$59,906.76, plus pre-judgment interest of \$8,608.36 and costs of \$15,387.79.

[12] Best Beaver paid Alouche nothing pursuant to the judgment. Two sheriffs, in purported execution of the judgment, attended at the premises of For Your Eyes Only and seized \$1,855 in cash. This provoked Downtown Eatery (1993) Ltd., which claimed that the money belonged to it, to commence an action against Alouche. [See Note 1 at end of document] Alouche defended the action and counterclaimed against all of the companies controlled by Grad and Grosman and against Grad and Grosman personally. In December 1997, Kiteley J. ordered that the \$1,855 seized by the sheriffs be paid into court to the credit of the action.

[13] There are other facts relevant to the disposition of the appeal, including two reorganizations of the Grad-Grosman companies. However, we find it convenient to describe those facts in the context of the specific issues to which they relate.

(2) The litigation

[14] The trial proceeded before C. Campbell J. in February 2000. The essence of the trial was Alouche's counterclaim in which he sought to recover against any or all of the defendants for his unsatisfied judgment against Best Beaver.

[15] Alouche advanced several bases for recovery of his earlier judgment against the new defendants. The trial judge addressed three of them in his reasons for judgment -- the common employer doctrine, oppression relief under the Ontario Business Corporations Act, R.S.O. 1990, c. B.16, and a tracing remedy associated with a fraudulent conveyance.

[16] The trial judge dismissed Alouche's counterclaim in its entirety. On the common employer issue, the trial judge rejected Alouche's submissions, both on the merits and because of the concept of estoppel. With respect to a potential oppression remedy, the trial judge held that such a remedy would not be appropriate because the reorganization of the Grad-Grosman companies was not undertaken for the purpose of depriving Alouche of recovery of his judgment against Best

Beaver. For similar reasons, he held that the defendants had not made any fraudulent conveyance, and, therefore, a tracing order was not appropriate.

[17] The appellant appeals from the trial judge's decision on the common employer and oppression remedy issues. At the hearing of the appeal, the appellant abandoned his appeal on the fraudulent conveyance/tracing issue.

C. Issues

[18] The issues on the appeal are:

- (1) Did the trial judge err in failing to find that some or all of the respondents were a common employer of the appellant? [Se Note 2 at end of document]
- (2) Did the trial judge err in failing to find that the conduct of the respondents was "oppressive" or "unfairly prejudicial" as those terms are used in the Ontario Business Corporations Act?

D. Analysis

- (1) The common employer issue

[19] The trial judge decided this issue against Alouche for two reasons: (1) Alouche was estopped from raising the issue in his counterclaim action to enforce his previous judgment because he had not raised it in his original wrongful dismissal action; and (2) Alouche had not established the prerequisites necessary to identify any of the respondents as a common employer, along with Best Beaver.

- (a) Res judicata/estoppel

[20] It will be recalled that shortly before the wrongful dismissal trial, Alouche brought a motion to add Grad and Grosman as defendants because he was concerned that Best Beaver might not respond to a judgment against it. Because this motion would have resulted in an adjournment of the trial, Alouche

decided to abandon it. The respondents submit that these steps precluded Alouche from raising the issue in the subsequent proceedings. The trial judge briefly reviewed the doctrines of res judicata, cause of action estoppel and issue estoppel. It is not entirely clear which of these doctrines he applied. However, it is clear that he agreed with the respondent's essential submission on this issue. He concluded:

I am satisfied on the evidence before me that Alouche was content in his wrongful dismissal action to allege that Best Beaver was his employer and to be bound by that conclusion, notwithstanding the possibility of some responsibility on the part of Messrs. Grad and Grosman.

On that basis, Alouche is now estopped from alleging a different or expanded employment obligation when he is now unable to recover on the first judgment.

[21] Let us say candidly that this is a plausible analysis and conclusion. On the eve of the wrongful dismissal trial, Alouche was concerned that the corporate reorganization about which he had recently learned might mean that Best Beaver no longer had assets which could potentially satisfy any judgment he obtained. Alouche's response was to consider, initiate and then abandon adding Grad and Grosman as defendants. In light of these steps, it is plausible to conclude, as the trial judge did, that Alouche considered the general question of whom he should sue and decided to proceed against only Best Beaver.

[22] However, in the end we do not think that this conclusion is correct. A particularly valuable discussion of res judicata and of issue estoppel is found in this court's decision in *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321, 168 D.L.R. (4th) 270 (C.A.) ("*Minott*"). Laskin J.A. articulated the underlying purpose of the concept of issue estoppel in this fashion, at p. 340 O.R.:

Issue estoppel is a rule of public policy, and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two

interests will be in conflict, or, at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.

[23] In our view, the issue Alouche considered on the eve of his wrongful dismissal trial was whether to sue Grad and Grosman in their personal capacities as potential employers because of his concern that Best Beaver, the corporate entity which he regarded as his employer (because it paid him), might have no assets. Alouche considered this option because, as he testified at the second trial, he regarded them as his employer:

Q At the time you signed this agreement that appears at Tab 1 [the employment contract], who did you believe to be your employer?

A. It was Herman Grad. I started working at For Your Eyes Only. That's the only place I know there.

However, in the end, Alouche made a conscious decision not to join Grad and Grosman in the wrongful dismissal action because it would have delayed the trial. Taking account of that decision, the trial judge concluded that Alouche was estopped from suing Grad and Grosman personally as potential employers in his subsequent action. We see no reason to interfere with this component of the trial judge's decision.

[24] However, the issue of a potential common employer for Best Beaver, drawn from the stable of Grad-Grosman companies that were closely connected with the operation of the For Your Eyes Only nightclub, was not considered by Alouche on the eve of the wrongful dismissal trial. He did not think about adding other companies at that juncture because the only entities of which he was aware were the nightclub, For Your Eyes Only, with which he had a contract of employment, and Best Beaver, which issued his pay cheques. He decided to sue Best Beaver "because

the paycheque that they gave me in For Your Eyes Only, it says Best Beaver Management Inc." This was a perfectly sensible reason for suing Best Beaver.

[25] Only later, after he had won a substantial judgment at trial and had been unable to collect on it from Best Beaver, did Alouche begin to think of other companies which might have been closely connected with For Your Eyes Only and Best Beaver. That inquiry led him, for the first time, to the respondent corporations.

[26] In summary, we cannot say that the trial judge erred by concluding that Alouche was estopped from pursuing Grad and Grosman personally as potential common employers in the counterclaim relating to the enforcement of the previous judgment in the wrongful dismissal action. However, we do not think that the common employer issue, as it relates to the corporate respondents, constitutes, in the language of Minott, "relitigating an issue". In this appeal, the balance between finality of litigation and achieving justice between litigants should be struck in favour of the latter. The common employer issue relating to the corporate respondents should be determined on the merits.

(b) The merits

[27] For Your Eyes Only was a simple entity, a single site nightclub in downtown Toronto. Yet, beneath the surface of lights, liquor and entertainment, there was a fairly sophisticated group of companies involved in the operation of the nightclub. Twin Peaks Inc. ("Twin Peaks") was the owner and lessor of the nightclub premises. The Landing Strip Inc. ("The Landing Strip") leased the premises from Twin Peaks. It also owned the trademark for For Your Eyes Only and held the liquor and adult entertainment licences. Downtown Eatery Limited ("Downtown Eatery") owned the chattels and equipment at the nightclub and operated it under a licence from The Landing Strip. Best Beaver paid the nightclub employees, including Alouche. In June 1993, all of these companies were owned and controlled by Bengro Corp. and Harrad Corp., the holding companies for Grosman and Grad.

[28] The trial judge considered Alouche's common employer argument on the merits. He concluded that Downtown Eatery was "the most logical of the companies to be treated as a co-employer", but that this did not help Alouche because Downtown Eatery amalgamated with Best Beaver in September 1993, and there was nothing fraudulent or even suspicious about the amalgamation.

[29] The trial judge then considered The Landing Strip:

Counsel for Alouche suggests that Landing Strip Inc., which held the lounge license and the franchise trademark, would be logical co-employers. There is nothing in the record before me that would suggest that Alouche ever had a contractual relationship with Landing Strip Inc.

Then, speaking more generally, the trial judge observed that "there has been no holding out here by either the employee or the employer of joint and several liability of more than one company".

[30] The common employer doctrine, in its common law context, has been considered by several Canadian courts in recent years. The leading case is probably *Sinclair v. Dover Engineering Services Ltd.* (1987), 11 B.C.L.R. (2d) 176 (S.C.), affd (1988), 49 D.L.R. (4th) 297 (B.C.C.A.) ("*Sinclair*"). In that case, *Sinclair*, a professional engineer, held himself out to the public as an employee of *Dover Engineering Services Ltd.* ("*Dover*"). He was paid by *Cyril Management Limited* ("*Cyril*"). When *Sinclair* was dismissed, he sued both corporations. Wood J. held that both companies were jointly and severally liable for damages for wrongful dismissal. In reasoning that we find particularly persuasive, he said, at p. 181 B.C.L.R.:

The first serious issue raised may be simply stated as one of determining with whom the plaintiff contracted for employment in January 1973. The defendants argue that an employee can only contract for employment with a single employer and that, in this case, that single entity was

obviously Dover.

I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations.

There is nothing sinister or irregular about the apparently complex intercorporate relationship existing between Cyril and Dover. It is, in fact, a perfectly normal arrangement frequently encountered in the business world in one form or another. Similar arrangements may result from corporate take-overs, from tax planning considerations, or from other legitimate business motives too numerous to catalogue.

As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.

See also: *Bagby v. Gustavson International Drilling Co.* (1980), 24 A.R. 181 (C.A.); *Olson v. Sprung Instant Greenhouses Ltd.* (1985), 64 A.R. 321, 41 Alta. L.R. (2d) 325 (Q.B.); *Johnston v. Topolinski* (1988), 23 C.C.E.L. 285 (Ont. Dist. Ct.); *MacPhail v. Tackama Forest Products Ltd.* (1993), 86 B.C.L.R. (2d) 218, 50 C.C.E.L. 136 (S.C.); and *Jacobs v. Harbour Canoe Club Inc.*, [1999] B.C.J. No. 2188 (S.C.).

[31] In Ontario, the common employer doctrine has been considered in several cases. In *Gray v. Standard Trustco Ltd.* (1994), 8 C.C.E.L. (2d) 46, 29 C.B.R. (3d) 22 (Ont. Gen. Div.), Ground J. said, at p. 47 C.C.E.L.:

. . . it seems clear that, for purposes of a wrongful dismissal claim, an individual may be held to be an employee of more than one corporation in a related group of corporations. One must find evidence of an intention to create an employer/employee relationship between the individual and the respective corporations within the group.

[32] In *Jones v. CAE Industries Ltd.* (1991), 40 C.C.E.L. 236 (Ont. Gen. Div.) ("*Jones*"), Adams J. reviewed many of the leading authorities and observed, at p. 249:

The true employer must be ascertained on the basis of where effective control over the employee resides . . . I stress again that an employment relationship is not simply a matter of form and technical corporate structure.

[33] *Sinclair, Jacobs v. Harbour Canoe Club Inc.* and *Jones* were all cases involving a "paymaster" company closely connected with another corporate entity, with both being controlled by the same principals. In all three cases, the courts found that the other company was a common employer. Similarly, in the present appeal, Best Beaver served only as a paymaster for the employees of the nightclubs owned and operated by other Grad and Grosman companies. Accordingly, the question becomes, in Adams J.'s language in *Jones*, "where effective control over the employee resides".

[34] In our view, in June 1993, when Alouche was dismissed, there was a highly integrated or seamless group of companies which together operated all aspects of the For Your Eyes Only nightclub. Twin Peaks owned the nightclub premises and leased them to The Landing Strip which owned the trademark for For Your Eyes Only and, significantly for a nightclub, held the liquor and entertainment licences. Downtown Eatery operated the nightclub under a licence from The Landing Strip and owned the chattels and equipment at the nightclub. Best Beaver served as

paymaster for the nightclub employees. Controlling all of these corporations were Grad and Grosman and their family holding companies, Harrad Corp. and Bengro Corp.

[35] Grad and Grosman could easily have operated the nightclub through a single company. They chose not to. There is nothing unlawful or suspicious about their choice. As Wood J. said in Sinclair, "it is a perfectly normal arrangement frequently encountered in the business world."

[36] However, although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. At the end of the day, Alouche's situation is a simple, common and important one -- he is a man who had a job, with a salary, benefits and duties. He was fired -- wrongfully. His employer must meet its legal responsibility to compensate him for its unlawful conduct. The definition of "employer" in this simple and common scenario should be one that recognizes the complexity of modern corporate structures, but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees.

[37] The trial judge focused on the absence of a contract between Alouche and any of the potential common employers. With respect, we think this focus is too narrow. A contract is one factor to consider in the employer-employee relationship. However, it cannot be determinative; if it were, it would be too easy for employers to evade their obligations to dismissed employees by imposing employment contracts with shell companies with no assets.

[38] The trial judge also observed that there was no holding out by the employer of joint and several liability of more than one company. Again, with respect, we do not attach much significance to this factor. After all, the contract of employment that Alouche signed was with For Your Eyes Only, which was only a name, not a legal entity.

[39] In these circumstances, when he was wrongfully

dismissed, Alouche did his best -- he sued the company which had paid him. Later, it turned out that that company had no assets. Yet the nightclub continued in business, various companies continued to operate it and, presumably, Grad and Grosman continued to make money. In these circumstances, Alouche decided to try to collect the money to which [the] Superior Court of Justice had determined he was entitled. In our view, the common employer doctrine provides support for his attempt.

[40] In conclusion, Alouche's true employer in 1993 was the consortium of Grad and Grosman companies which operated For Your Eyes Only. The contract of employment was between Alouche and For Your Eyes Only which was not a legal entity. Yet the contract specified that Alouche would be "entitled to the entire package of medical extended health care and insurance benefits as available in our sister organization". The sister organization was not identified. In these circumstances, and bearing in mind the important roles played by several companies in the operation of the nightclub, we conclude that Alouche's employer in June 1993 when he was wrongfully dismissed was all of Twin Peaks, The Landing Strip, Downtown Eatery and Best Beaver. This group of companies functioned as a single, integrated unit in relation to the operation of For Your Eyes Only.

[41] There is a final matter to be considered on the common employer issue. Alouche was dismissed in June 1993. There was a reorganization of Grad and Grosman companies in September 1993. A second reorganization took place in May 1996, three months before the trial in Alouche's wrongful dismissal action. The trial judge found that there was nothing nefarious about these reorganizations; they were undertaken for business reasons unrelated to Alouche's action. We see no reason to disagree with this conclusion.

[42] The question which the reorganizations pose is whether Alouche's judgment, which we have determined should be enforced against all of the companies involved in June 1993 in the operation of For Your Eyes Only, should also be enforced against the successor or merged companies which have been created by the reorganizations.

[43] We have no hesitation answering this question in the affirmative. Grad testified at the trial that he was very careful to protect the positions, seniority and benefits of current employees when he and Grosman were accomplishing the reorganizations. He said:

Everyone had a job . . . Everyone that worked for one had a job in the other . . . No one would lose anything . . . The employees were not to lose anything, were not to be hurt.

[44] This was, of course, admirable treatment of the current employees of the Grad and Grosman companies. It commends itself, in our view, as a just basis for consideration of Alouche's position after the reorganizations. If, as Grad explained, his current employees were not to be hurt in any way by the reorganizations, it seems obvious and fair that a similar result should flow for Alouche, a man who might also be a current employee but for the fact of his wrongful dismissal.

[45] We conclude, therefore, that the list of the original common employers should be expanded to include the other corporate respondents.

(2) The oppression issue

[46] Alouche contends that the conduct of the respondents, specifically the corporate reorganizations which resulted in Best Beaver ceasing to exist, was "oppressive" or "unfairly prejudicial" as those terms are used in the Ontario Business Corporations Act ("OBCA"). Section 248 of the OBCA provides:

248(1) A complainant . . . may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a

result;

- (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
- (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

A "complainant", in addition to being a current or former shareholder, director or officer of the company, is defined in s. 245 to include:

.

- (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

Although it appears from the pleadings and the factum that Alouche is advancing the oppression argument against all of the respondents, in oral argument counsel made it clear that the focus of Alouche's claim on this issue is the respondents Grad and Grosman.

[47] As a preliminary matter, we note that there is no question of res judicata or estoppel with respect to the appellant's oppression claim. There was nothing about this claim in the pleadings in the first action, the trial judge in the second action dealt with the claim on the merits, and the respondents in this appeal do not contend that the oppression claim was barred by these doctrines.

[48] Turning to the merits, in the Agreed Statement of Facts, facts pertaining to the oppression remedy are sparse. These

facts are: Grad and Grosman were directors and officers of Best Beaver at all material times; in September 1993, there was a corporate reorganization of Best Beaver and several of the other corporate respondents in response to apprehended union activities; and in or about March 1996, Best Beaver ceased operations.

[49] In his trial testimony, Grad stated that because the "union threat" had disappeared in 1996 there was no need to retain Best Beaver as a separate company. This resulted in Best Beaver ceasing operations in March 1996, followed by a corporate reorganization in May 1996. He testified that these events were not influenced by the pending litigation involving Alouche. Indeed, it was Grad's belief that Best Beaver would win the lawsuit. He described what occurred as "a business decision". Grad confirmed that he and Grosman were the owners of Best Beaver and all of the corporate respondents. He also confirmed that "the role and function" of Best Beaver were to pay the employees of the corporations that he and Grosman owned and that the company carried out this role "based on advice from [his] accountants".

[50] Although Grad testified that Alouche's pending claim did not influence his decision to terminate the operations of Best Beaver in March 1996, he acknowledged that at that time a summer trial date had been fixed for the wrongful dismissal trial. He stated that he discharged Best Beaver's lawyer about two weeks before the trial began "because there was no money in the account and [Best Beaver] could not afford to pay" the lawyer. At the trial, Grad acted as Best Beaver's legal representative.

[51] Syd Bojarski ("Bojarski") was a partner in the accounting firm that acted for the corporate respondents and Grad and Grosman. He provided extensive evidence concerning the corporate and financial affairs of these entities. He testified that in each year of its existence, Best Beaver earned a profit. He agreed with counsel for Alouche that Best Beaver's accumulated profits were available to pay "whatever obligations [Best Beaver] had". He further agreed that if that company had continued its operations, its accumulated profit could have

been applied "to satisfy unexpected claims arising from employment [contracts]".

[52] In the following questions and answers Grad was asked to comment on Bojarski's evidence:

Q. Mr. Bojarski gave evidence that it was the role and function of Best Beaver Management as a corporation to pay employees until, of course, until it ceased to do that. But that was its obligation, correct?

A. Yes.

Q. Do you agree with Mr. Bojarski that its obligation was also to pay any claims that individual employees might have against it as employer?

A. It was responsible for all the employees and the management of those people.

[53] In dismissing Alouche's claim for an oppression remedy, the trial judge accepted Grad's reasons for the corporate reorganizations of September 1993 and May 1996 and for Best Beaver's cessation of operations in March 1996. He provided the following reasons for dismissing Alouche's claim for an oppression remedy:

In the case before me, if I had been satisfied that the amalgamation of 1993 or the reorganization of 1996 had been undertaken with the intention of depriving Mr. Alouche of the opportunity to recover against Best Beaver, then an oppression remedy might have been appropriate. In the circumstances where the amalgamation and reorganization took place before he obtained the status of a judgment creditor and those actions were not undertaken for the purpose of depriving him of recovery of judgment, then it would appear that the oppression remedy is not appropriate.

[54] At trial, C. Campbell J. also dismissed a claim by Alouche based on the submission that the May 1996 corporate reorganization constituted a fraudulent conveyance resulting in

Best Beaver having no assets in the event that he recovered judgment against it. No appeal was taken from this aspect of the judgment. However, the following findings of fact made by the trial judge in deciding this issue are relevant to the oppression remedy issue:

As noted previously, I am satisfied on the evidence, the reorganization was not entered into for the purpose or with the intent of depriving Alouche from recovering on an anticipated judgment.

I do recognize, however, that the effect of the reorganization left Best Beaver essentially as a non-operating company and that Grad took advantage of this, when faced with the pending trial (by discharging counsel) and by non-payment of the judgment.

[55] In our view, this case is similar to *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1995), 131 D.L.R. (4th) 399, 25 B.L.R. (2d) 179 (Ont. Gen. Div.), varied (1998), 40 O.R. (3d) 563, 162 D.L.R. (4th) 367 (C.A.) ("*Sidaplex-Plastics*"). As in *Sidaplex-Plastics*, Alouche, as a judgment creditor of a corporate party, seeks an oppression remedy in the absence of bad faith or want of probity on the part of individuals who were the directors and shareholders of the corporation. As in *Sidaplex-Plastics*, the corporation, Best Beaver, is no longer in business, having ceased operations in March 1996, at a time when a trial date of August 1996 had been fixed for the wrongful dismissal action against it. Thus, Alouche seeks to invoke the oppression remedy provisions of the OBCA against Grad and Grosman in order to rescue himself from the inability of Best Beaver to pay his judgment which resulted from their decision to terminate its business operations and to render it without assets capable of responding to a possible judgment against it.

[56] The application of the principles governing s. 248(2) of the OBCA to the trial judge's findings of fact and to the evidence in the trial record leads to the conclusion that the trial judge erred in failing to grant an oppression remedy against Grad and Grosman. In our view, the trial judge failed

to appreciate that the "oppressive" conduct that causes harm to a complainant need not be undertaken with the intention of harming the complainant. Provided that it is established that a complainant has a reasonable expectation that a company's affairs will be conducted with a view to protecting his interests, the conduct complained of need not be undertaken with the intention of harming the plaintiff. If the effect of the conduct results in harm to the complainant, recovery under s. 248(2) may follow.

[57] In *Sidaplex-Plastics*, Blair J. provided a careful and thorough analysis of the principles governing the award of an oppression remedy that was accepted by this court. At p. 403 D.L.R., he stated that it "is well established . . . that a creditor has status to bring an application as a complainant, pursuant to s. 245(c)." At pp. 403-04, he added:

Moreover, while some degree of bad faith or lack of probity in the impugned conduct may be the norm in such cases, neither is essential to a finding of "oppression" in the sense of conduct that is unfairly prejudicial to or which unfairly disregards the interests of the complainant, under the OBCA.

Blair J. continued, at p. 404 D.L.R.:

What the OBCA proscribes is "any act or omission" on the part of the corporation which "effects" a result that is "unfairly prejudicial to or that unfairly disregards the interests" of a creditor.

(Emphasis in original)

[58] At p. 404, Blair J. adopted the following factors to be assessed in considering whether an oppression remedy should lie, as described by McDonald J. in *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28, 60 Alta. L.R. (2d) 122 (Q.B.) at p. 57 B.L.R.:

More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: the

protection of the underlying expectation of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor. The elements of the formula and the list of considerations as I have stated them should not be regarded as exhaustive. Other elements and considerations may be relevant, based upon the facts of a particular case.

[59] In s. 248(2)(c) of the OBCA, the legislature has included the exercise of the powers of a company's directors in targeting the kinds of conduct encompassed by an oppression remedy. In this regard, Blair J. stated, at pp. 405-06 D.L.R.:

Courts have made orders against directors personally, in oppression remedy cases: see, for example, *Canadian Opera Co. v. Euro-American Motor Cars*, supra; *Prime Computer of Canada Ltd. v. Jeffrey*, supra; *Tropxe Investments Inc. v. Ursus Securities Corp.*, [1993] O.J. No. 1736 (QL) (Gen. Div.) [summarized 41 A.C.W.S. (3d) 1140]. These cases, in particular, have involved small, closely held corporations, where the director whose conduct was attacked has been the sole controlling owner of the corporation and its sole and directing mind; and where the conduct in question has redounded directly to the benefit of that person.

[60] Although the trial judge found that the cessation of Best Beaver's operations in March 1996 and the subsequent corporate reorganization were not undertaken with the intention of depriving Alouche of the ability to recover against Best Beaver if he were to succeed in his forthcoming action against the company, he went on to find that the effect of this conduct "left Best Beaver essentially as a non-operating company and that Grad took advantage of this, when faced with the pending trial (by discharging counsel) and by non-payment of the judgment". In our view, there is no question that the acts of Grad and Grosman, as the directors of Best Beaver, in causing the company to go out of business and transferring its assets to other companies within the group of companies they owned and operated in the spring of 1996 in the face of a trial scheduled

to begin a few months later, effected a result that was unfairly prejudicial to, or that unfairly disregarded the interests of, Alouche as a person who stood to obtain a judgment against Best Beaver. Moreover, there was nothing that Alouche could have done to prevent the effective winding-up of Best Beaver.

[61] In our view, the evidence of Bojarski, with which Grad agreed, is relevant to whether an oppression remedy is appropriate. From Bojarski's testimony, it is clear that when Best Beaver went out of business it was profitable and that its accumulated profits were available to satisfy any claims arising from employment contracts. The inference can be drawn from this evidence that even though it was abundantly clear to Grad that Alouche's pending claim might result in a judgment against Best Beaver, he took no steps to ensure that Best Beaver retained a reserve to meet that contingency. Rather, believing that Alouche's action would fail, he discharged the company's lawyer and personally assumed its defence at trial. As in *Sidaplex-Plastics* at p. 405 D.L.R., it was Alouche who was entitled to be protected, and, in our view, it was Grad and Grosman who had the obligation to ensure that such protection continued. See Christopher C. Nicholls, "Liability of Corporate Officers and Directors to Third Parties", (2001) 35 C.B.L.J. 1 at pp. 30 et seq.

[62] In our view, there are additional inferences that can be drawn from the trial judge's findings of fact and from the evidence at the trial. It was the reasonable expectation of Alouche that Grad and Grosman, in terminating the operations of Best Beaver and leaving it without assets to respond to a possible judgment, should have retained a reserve to meet the very contingency that resulted. In failing to do so, the benefit to Grad and Grosman, as the shareholders and sole controlling owners of this small, closely held company, is clear. By diverting the accumulated profits of Best Beaver to other companies that they owned, they were able to insulate these funds from being available to satisfy Alouche's judgment.

[63] For the foregoing reasons, it is our opinion that Alouche has demonstrated his entitlement to an oppression

remedy against Grad and Grosman.

E. Disposition

[64] We would allow the appeal against all of the respondents. The appellant is entitled to recover from the respondents the amounts he was awarded in the wrongful dismissal action, namely damages of \$59,906.76, pre-judgment interest of \$8,608.36 and assessed costs of \$15,387.79 totalling \$83,902.91, together with post-judgment interest thereon from the date of Festeryga J.'s judgment to the date of this order and post-judgment interest thereafter. He is also entitled to recover his costs of the second trial before C. Campbell J. and his costs of the appeal.

Appeal allowed.

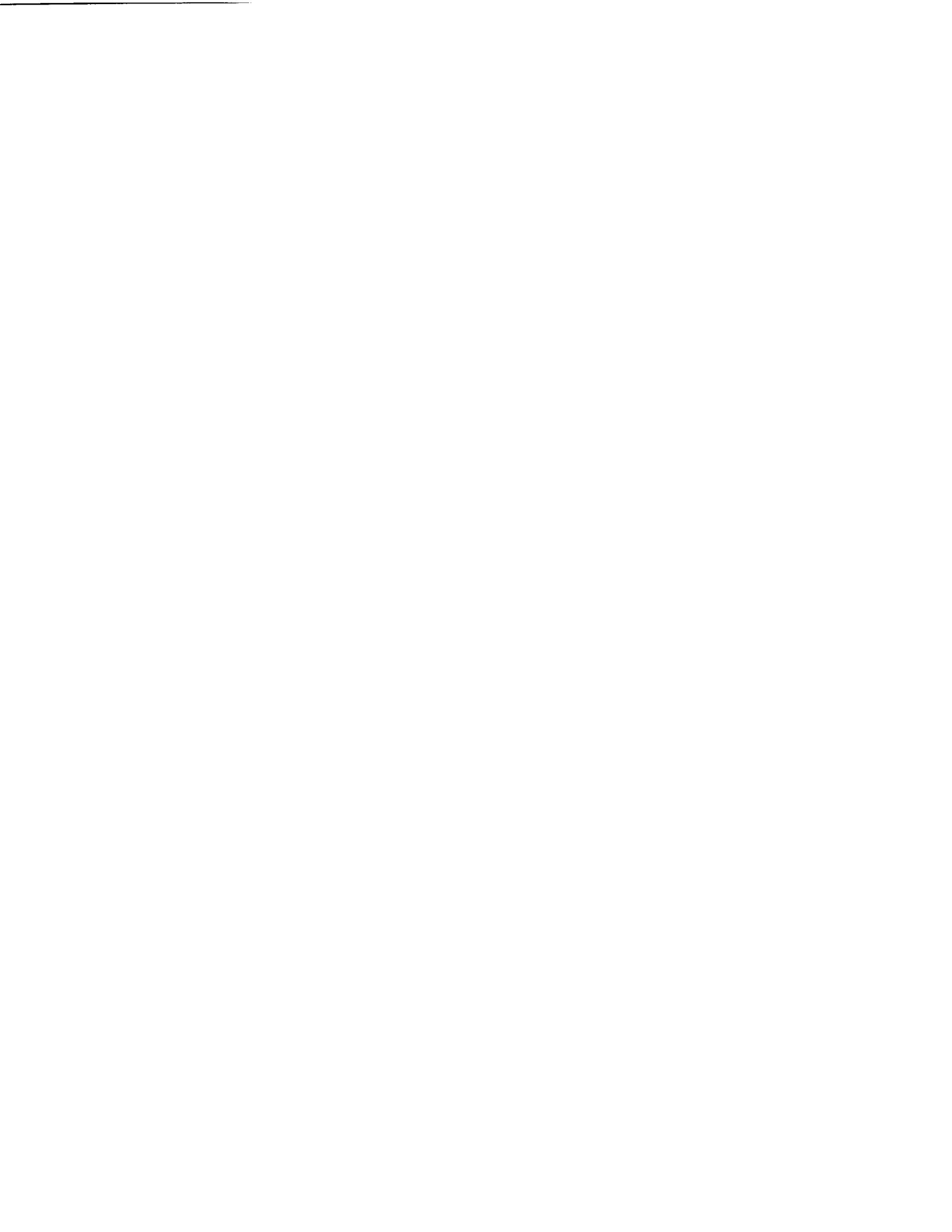
Notes

Note 1: Downtown Eatery (1993) Ltd. also name Her Majesty the Queen in Right of Ontario as a defendant, presumably on the basis of its alleged responsibility for the sheriffs. This component of the action was subsequently discontinued.

Note 2: In his factum, the appellant identified a separate ground of appeal as the trial judge's failure to permit Alouche to proceed by what he called an "alter ego" action. In oral argument, the appellant suggested that the common employer doctrine is a sub-species of the alter ego doctrine. Like the trial judge, we do not consider the injection of the nebulous concept of alter ego corporations useful. The common employer doctrine is well-recognized in Canadian law and provides a sound and straightforward foundation on which to assess the corporate relationship issue in this appeal.



Tab 20



ONTARIO LABOUR RELATIONS BOARD

0901-99-U United Steelworkers of America, Applicant v. **Saan Stores Ltd. and Gendis Inc.**, Responding Party.

0902-99-R United Steelworkers of America, Applicant v. **Saan Stores Ltd. and Gendis Inc.**, Responding Party v. Group of Employees, Intervenors.

BEFORE: Patrick Kelly, Vice-Chair.

APPEARANCES: Jeff Andrew and Robert McKay appeared on behalf of the applicant; Don Houston and Jennifer Roberts-Logan appeared on behalf of the responding party. No one appeared on behalf of the Group of Employees, Intervenors.

DECISION OF THE BOARD; July 16, 2001

1. Board File No. 0902-99-R is an application under section 69 and 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended ("the Act"). The applicant alleges a sale of a business by Greenberg Stores Ltd. to Saan Stores Ltd. and Gendis Inc., and in the alternative, seeks a declaration that Gendis Inc., Greenberg Stores Ltd. and Saan Stores Ltd. are related businesses. Board File No. 0901-99-U is an application filed pursuant to section 96 of the Act, alleging violations of sections 56, 70, 72, and 87(1) of the Act.
2. The intervenors in Board File No. 0902-99-R did not appear at the hearing.
3. The parties who participated in the hearing agreed that the Board should deal first with Board File No. 0902-99-R, and following a decision in that matter, remain seized to deal, if necessary, with the section 96 application. Accordingly, this decision concerns only Board File No. 0902-99-R.
4. The parties in this matter reached agreement on the material facts, set out below:

AGREED STATEMENT OF MATERIAL FACTS

Introduction

1. The Applicant United Steelworkers of America ("USWA") was the bargaining agent for certain employees of Greenberg Stores Ltd. ("Greenberg") in the town of Marathon, Ontario.
2. The Respondent, Gendis Inc. ("Gendis"), owned 100% of Metropolitan Stores of Canada Limited ("Metropolitan Stores"), a property holding company which in turn owned 100% of Greenberg and Saan Stores Ltd. ("Saan").

3. Greenberg operated "The Met" in a mall in the small town of Marathon.
4. As part of a restructuring of its retail operations in 1997, Gendis withdrew its financial support for Greenberg. Greenberg then made an assignment into bankruptcy on February 11, 1997. The Met store in Marathon was liquidated by the Trustee in bankruptcy by June of 1997.
5. Until April of 1999, Saan did not have a commercial presence in Marathon. In April of 1999, Saan opened a store in a different location in the same mall in Marathon.

Certification and Bargaining History

6. USWA was certified on an interim basis in December 1994 as the exclusive bargaining agent for all employees of Greenberg Stores in the town of Marathon, Ontario save and except certain managerial employees. A final certificate was issued in October 1995.

Applicant's Appendix 1: Certificate dated October 5, 1995

7. From the time of certification until its bankruptcy in February 1997, Greenberg operated one department store in Marathon under the name "The Met". The store was located in Marathon Centre Mall.
8. The Met was a retail store which sold a wide range of merchandise including clothing, furniture, stationery, house wares, general household items and confectionaries. It also operated a restaurant.
9. Approximately 38 full and part-time bargaining unit employees worked at The Met. It was approximately 25,000 square feet.
10. The USWA served Greenberg with notice to bargain a first collective agreement on or about January 31, 1995.
11. The USWA applied for first contract arbitration on December 4, 1995. A Board of Arbitration purported to settle a first collective agreement in an award dated November 12, 1996.

Applicant's Appendix 5: First Contract Arbitration Award, November 12, 1996

12. Greenberg refused to implement the collective agreement, alleging, *inter alia*, that the Board of Arbitration exceeded its jurisdiction by including a "union shop" clause in the collective agreement. Greenberg filed an application for judicial review of the Board's award on December 16, 1996. Greenberg had not perfected the application at the time it was assigned into bankruptcy on February 11, 1997.
13. On November 26, 1996, the USWA made a complaint to the Ontario Labour Relations Board under section 96 of the *Labour Relations Act* (the "Act"), alleging that Greenberg had violated section 17, 56 and 70 of the *Act*, because Greenberg had not executed and implemented the alleged first collective agreement included in the award by the Board of Arbitration.

Respondents' Appendix 7: *Greenberg Stores Ltd.*, [1997]
O.L.R.D. No. 293

14. On February 3, 1997, the Labour Board issued its decision on the USWA's complaint. The Labour Board declined to enforce the alleged first collective agreement against Greenberg, or to inquire into the USWA's complaint.

Respondents' Appendix 7: *Greenberg Stores Ltd.*, [1997]
O.L.R.D. No. 293

15. The USWA did not seek judicial review of the Labour Board's decision to refuse to inquire into the complaint.

Corporate Structure and Governance

16. Gendis is incorporated federally. It has interests in a number of fields including retail merchandising, the pipeline industry, and real estate management. Its activities and those of its subsidiaries have changed over time but are accurately described at the time they are described in the various company reports filed by the parties.
17. Greenberg had four directors and Saan had three directors. Two of the directors on the Saan and Greenberg board were the same, being Messrs. Albert D. Cohen and G. Allan MacKenzie.
18. Albert D. Cohen was Chairman and Chief Executive Officer for Gendis, MMG Management Group (which collectively refers to stores operated by Greenberg), Saan and Metropolitan; and G. Allan MacKenzie, President and Chief Operating Officer of Gendis and Metropolitan and Chairman of the Executive Committee of both MMG Management Group and Saan.

Applicant's Appendix 6: Excerpt from Gendis Inc. Annual Report 1995

19. Mr. Cohen and Mr. MacKenzie continued to hold these positions with Gendis and Saan until Mr. Cohen's retirement in April 1999. Mr. MacKenzie is now President of Gendis and Chief Executive Officer of both Gendis and Saan. MacKenzie is also Chairman of Saan.

Applicant's Appendix 7: Gendis Inc. Annual Report 1999

Saan and Greenberg

20. Saan and Greenberg were retail chains, each with its own management group. Saan and Greenberg also used different logos and trademarks.
21. Greenberg operated under the names "Greenberg," "Met Mart" or "Met" (collectively referred to as "MMG Management Group"). Met stores were located across Canada while "Greenberg" stores were located principally in French speaking communities in Quebec and Atlantic Canada.

22. Greenberg's head office and distribution centre were located in Point Claire, Quebec. Greenberg supplied inventory to its store locations from its distribution centre. The administration, marketing, purchasing, management, merchandising, store operation and human resources functions for the Greenberg chain were concentrated at its head office and distribution centre in Point Claire. Greenberg employees were entitled to participate in a Gendis pension and benefits program.

Respondents' Appendix 2: Annual Information Form for Gendis Inc. dated March 25, 1996 at 4, 6-7

Respondents' Appendix 3: Organization Chart for Greenberg dated June 1996

23. Prior to 1997, Saan operated predominantly in the Western Provinces, Ontario, the Yukon and Northwest Territories.
24. Saan's head office and distribution centre are located in Winnipeg, Manitoba. Saan supplied inventory to its store locations from its distribution centre. The administration, marketing, purchasing, management, merchandising, store operation and human resource functions for the Saan chain are and were performed at its head office and distribution centre in Winnipeg. Saan employees were entitled to participate in a Gendis pension and benefits program.

Respondents' Appendix 2: Annual Information Form for Gendis Inc. dated March 25, 1996 at 4, 6

Respondents' Appendix 4: Organization Chart for Saan dated August-September 1995

25. Saan operates retail stores across Canada, catering to small town communities in particular. It sells family clothing, footwear, accessories, linens and other household products.

Bankruptcy of Greenberg

26. Gendis initiated a restructuring of its retail operations in or around the first few months of 1997. On February 10, 1997, the company's Board of Directors decided to withdraw financial support from Greenberg after it experienced operating losses in the previous three years of approximately \$80,000,000.00.

Respondents' Supplementary Record, Director's Resolution dated February 10, 1997

27. On February 11, 1997, Greenberg then assigned itself into bankruptcy,

Respondents' Appendix 5: Gendis Inc. Annual Report 1997 at 2

28. The firm of Caron, Belanger, Ernst and Young was appointed Trustee in Bankruptcy of Greenberg and immediately took control of the assets, including the Met store in Marathon.

Respondents' Appendix 5: Gendis Inc. Annual Report 1997
at 2

29. Saan then entered into an agreement with the Trustee to purchase certain of Greenberg's assets, including 89 of Greenberg's 169 stores. The purchase was approved by the Quebec Superior Court (In Bankruptcy) on February 11, 1997.

Applicant's Appendix 9: Gendis Inc. Annual Report 1997 at p. 6 ff.

Respondents' Supplementary Record: Order of Quebec Superior Court dated February 10, 1997, including Offer to Purchase

30. Saan did not purchase any of the following assets relating to the former Met store in Marathon: inventory, equipment, fixtures, or accounts receivable, or take an assignment of the lease relating to the former Met store in Marathon.

Respondents' Supplementary Record: Order of Quebec Superior Court dated February 10, 1997

31. By letter dated February 11, 1997, Messrs. Cohen and Mackenzie advised employees of The Met in Marathon that Gendis "as banker to MMG decided to terminate its support for MMG and restructure its retail operations." Mr. Cohen and Mr. MacKenzie further informed employees that some MMG stores would be consolidated with the Saan chain. They stated that The Met in Marathon was not one of the stores selected to be acquired by Saan.

Applicant's Appendix 10: Letter from Gendis Inc. dated February 11, 1997

32. In June 1997, after liquidating the Met's inventory, the Trustee closed the Met store in Marathon.

Saan in Marathon

33. In or around the Fall of 1998, "OK Economy", a food store, moved from its locale in the Marathon Centre Mall to the space formerly occupied by The Met. The store now operates under the name "Extra Foods".
34. Saan opened a retail operation in the Marathon Centre Mall in April 1999. The new store opened in the space vacated by the OK Economy food store on April 7, 1999. The size of the leased premises is now approximately 14,219 square feet.

Applicant's Appendix 11: Press release from Saan web site dated April 7, 1999

35. Saan conducted substantial renovations to convert the leased premises from a food store to a clothing store.

36. The new store relies on a similar customer base as the former Met store.
37. The retail sales work performed by employees of Saan is similar to that performed by the retail sales staff of the Met store in Marathon. Employees of the Saan store in Marathon are, however, required to perform sales work, stock work, administration and paper work and housekeeping. In addition, the Saan store in Marathon does not have a restaurant and has no need for servers, cooks or other restaurant workers.

Date: January 22, 2001

“R. McKay”
for the Applicant

“D. Houston”
for the Respondents

5. The parties also were content to rely upon the documents filed by the applicant (“USWA”) and the responding parties (“Gendis” and “Saan” respectively) in support of the application and response. Their arguments were based upon these documents and the agreed facts.

6. The documentary evidence showed that there were marketing strategies developed and implemented by Gendis that were common to Greenberg Stores Ltd. (“Greenberg”) and Saan, and that the employees of both Greenberg and Saan participated in a group benefit plan of which Gendis was the insured.

The Argument of the Applicant

7. The applicant acknowledged that Saan did not acquire any of the tangible assets associated with Greenberg’s Met store in Marathon. However, it argued that Saan did acquire, through its purchase of Greenberg’s estate following the assignment in bankruptcy, intangible assets in the form of Greenberg’s trademarks and trade names (including all the goodwill in connection with which such trademarks and trade names had been used), thus enabling Saan, which prior to April 1999 had no retail presence in Marathon, to open a store similar in product line and operation to, and in the same mall that had previously housed, Greenberg’s Met store.

8. The applicant asked the Board to draw the following conclusions. Retail is a key component of the business of Gendis. Saan and, at one time, Greenberg were the two arms of that business component, operating through different parts of Canada. Gendis initiated the bankruptcy of Greenberg, and, as a result of that action, the control of Greenberg’s trademarks passed to Saan (via the purchase of portions of the Greenberg estate), which in 1999 opened for business in Marathon, serving the same clientele in the same mall as did Greenberg via its Met store. The applicant contended that, but for the non-arm’s length manipulation by Gendis in forcing Greenberg’s financial collapse, Saan would not be operating in Marathon, and thus the Board should find a sale of business. In the alternative, the applicant argued that the Board should declare that Gendis, Saan and Greenberg are related businesses because both Saan and Greenberg operated in substantially the same retail businesses under Gendis, and shared common

control and direction through the corporate governance structure which included certain key executive officers common to all applicable governing boards.

9. In support of its position in this matter, counsel for the applicant referred me to the following decisions: *Gordons Markets a Division of Zehrmart*, [1978] O.L.R.B. Rep. July 630; *Ian Somerville Construction Ltd.*, [1988] O.L.R.B. Rep. Oct. 1022; *Ellis Don Limited* [1992] O.L.R.D. No. 3322 unreported; *Dutch Boy Food Markets*, 65 CLLC ¶ 16,051; *Etobicoke Public Library Board*, [1989] O.L.R.B. Rep. Sept. 935; *The Borden Company Limited and Silverwood Dairies Limited*, [1970] O.L.R.B. Rep. Jan. 1244; *Dominion Sheet Metal & Roofing Works*; [1996] O.L.R.D. No. 3222; *Long Lake Forest Products Inc.*, [1994] O.L.R.B. Rep. Oct. 1343; *Saan Stores Ltd.* (Sept. 16, 1997) 4527 (N.S.L.R.B.); *Brant Erecting and Hoisting* [1980] O.L.R.B. Rep. July 945; *Canac Shock Absorbers Limited*, [1973] O.L.R.B. Rep. Oct. 509; *Zehrs Markets Limited*, [1974] O.L.R.B. Rep. May 331; *Metropolitan Parking Inc.*, [1979] O.L.R.B. Rep. Dec. 1194; *Thunder Bay Ambulance Services Inc.*, [1978] O.L.R.B. Rep. May 467; *Vulcan Containers Ltd.*, [1997] O.L.R.B. Rep. Aug. 765; *Penmarkay Foods Limited*, [1984] O.L.R.B. Rep. Sept. 1214; *STM Specialized Transit Management Corporation*, [1991] O.L.R.B. Rep. July 900; *Canada Stampings & Dies Ltd.*, [1996] O.L.R.B. Rep. June 355; *Vagden Mills Ltd.*, [1998] O.L.R.D. No. 4221; *Accomodex Franchise Management Inc.*, [1993] O.L.R.B. Rep. Apr. 281.

The Argument of the Responding Parties

10. Counsel for the responding parties argued that the material facts and documents in this matter did not support a finding of a sale of business, nor a finding of related employers, but in the event that the Board was persuaded that the applicant had substantiated the necessary elements for a finding of related employers, nevertheless the Board should decline to exercise its discretion to make a declaration under section 1(4) of the Act.

11. The first prong of the responding parties' argument is that Saan and Greenberg were separately managed, discrete businesses operating from geographically distinct head offices and distribution centres. Each had its own management group and reporting structure, and unique logos and trademarks. The only personnel links between the businesses occurred at an extremely high and remote level (directors) in each organization, which, counsel submitted, is not the kind of managerial control contemplated by section 1(4) of the Act.

12. Secondly, counsel for the responding parties contended that there were significant differences in the nature of the Greenberg and Saan businesses in Marathon. Admittedly, both were engaged in retail, but the Met was a much larger and more diverse operation, employing a larger work force than the Saan store whose focus was on family clothing, not furniture or restaurant sales. Moreover, counsel argued, there has been no suggestion that the employees of the Met store viewed themselves as anything but Greenberg employees.

13. Thirdly, it was argued by the responding parties that Saan did not acquire either of the tangible or intangible assets associated with the Marathon store. Counsel requested the Board to look closely at the agreement of purchase and sale ("the sale agreement") covering the assets of the 89 Greenberg stores (excluding, of course, the Met store in Marathon) sold to Saan. That agreement was not intended to convey any interest in Greenberg's stores other than those associated with the 89 stores which were the subject of the sale. Thus, equipment, franchise agreements, inventory and leases are all described in the sale agreement with reference to specific leased Greenberg store locations, none of which operated in Marathon. Similarly the term "other intangible assets" in the sale agreement, including goodwill, are referred to "strictly with respect

to leased locations". It so happens, counsel argued, that "trademarks and trade names", which the applicant seizes upon as indicative of a sale involving the Met store, could not, by their very nature, be described in reference to any particular leased Greenberg store location. When viewed in its entirety, counsel argued, the sale agreement conveys clearly the intention of its signatories to transfer nothing beyond which could properly be associated with the 89 Greenberg stores.

14. Fourthly, counsel for the responding parties noted that there was an approximate two-year hiatus between the closing of the Met store by the trustee in bankruptcy, and the opening by Saan of its store in a different location in the same mall in Marathon.

15. The fifth and final part of the responding parties' argument concerned the labour relations history of the Met store. Counsel argued that the general history of tempestuous relations between the applicant and the store are irrelevant to this proceeding. Nevertheless, counsel contended that there never was a collective agreement covering the Met employees in Marathon, and therefore there is no collective agreement to impose upon Saan in relation to its Marathon operation. Notwithstanding that an arbitrator ordered the Met and the applicant to enter into a collective agreement settled by the arbitrator, the employer sought judicial review of the arbitrator's award, and, mainly because of the court proceeding, this Board declined the applicant's request to enforce the arbitrator's award. Shortly thereafter, the Met store followed its Greenberg counterparts into bankruptcy, and the employer's application for judicial review was never perfected. Furthermore, the effect of section 43(19) of the Act is such that, even if there had been a collective agreement settled by arbitration, the term of such agreement would be only two years, expiring in 1998, notwithstanding any renewal provision awarded by the arbitrator.

16. In support of the position of the responding parties, counsel referred me to the following decisions: *Walters Lithographic Company Limited*, [1971] O.L.R.B. Rep. July 406; *Diversey (Canada) Ltd.*, [1978] O.L.R.B. Rep. Sept. 814; *Radio Shack*, [1979] O.L.R.B. Rep. July 689; *Donald A. Foley*, [1980] O.L.R.B. Rep. April 486; *Brant Erecting and Hoisting*, [1980] O.L.R.B. Rep. July 945; *Ethyl Canada Inc.*, [1982] O.L.R.B. Rep. July 998; *John Hayman & Sons Co.*, [1984] O.L.R.B. Rep. June 822; *Eighty-Five Electric*, [1987] O.L.R.B. Rep. June 833; *Ontario Legal Aid Plan v. Ontario Public Service Employees Union*, (1991), 6. O.R. (3d) 481 (C.A.); *Inplant Contractors Inc.*, [1993] O.L.R.B. Rep. May 421; *W.W. Lester v. U.A. Local 740 (1978) Ltd.*, (1990), 76 D.L.R. (4th) 389 (S.C.C.); *Ottawa Truck Centre*, [1982] O.L.R.B. Rep. Nov. 1704; *Zellers Inc.*, [1995] O.L.R.B. Rep. Aug. 1141; *McIntosh v. Parent*, [1924] O.L.R. 552 at 555 (C.A.).

Decision

Was there a sale of business?

17. The relevant portions of section 69 in this matter are set out below:

69. (1) In this section,

"business" includes a part or parts thereof; ("entreprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until

the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 16 or 59, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 16 or 59, as the case requires.

...

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

(9) Where an application is made under this section, an employer is not required, despite the fact that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

...

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

18. The jurisprudence with respect to the statute's sale of business provisions is substantial. The Ontario Court of Appeal in *Charterways Transportation Limited*, [1998] OLRB Rep. Sept./Oct 897 offers a recent observation concerning the nature and purpose of section 64 (now section 69) in a decision whose reasons were adopted in substance by the majority of the Supreme Court of Canada ([2000] OLRB Rep. Mar./Apr. 413). At paragraph 24 the Court of Appeal noted:

...The statutory definition is inclusive: "sells' includes leases, transfers and any other manner of disposition". Because of the remedial purpose of s.64 [now s.69], namely the preservation of bargaining rights, this definition is to be given a broad and liberal interpretation. Moreover, it is not required that

the transfer take any particular legal form nor take place by way of a legal transaction. In *W.W. Lester, supra*, at 674-75, McLachlin J. put it this way:

Ten of the labour acts have provisions similarly worded to s.89 of the Newfoundland Act, referring to transactions such as sale, lease, transfer or disposition. (The Quebec Act also contains a successorship provision but the section uses the phrase “alienation or operation”.) Although the terms “sale” and “lease” may have restricted meanings, the words “transfer” and other “disposition” have been broadly interpreted to include several types of transactions, including exchange, gift, trust, take overs, mergers, and amalgamation.

In keeping with the purpose of successorship provision – to protect the permanence of bargaining rights – labour boards have interpreted “disposition” broadly to include almost any mode of transfer and have not relied on technical legal forms of business transactions. As explained by the Ontario Board in *United Steelworkers of America v. Thorco Manufacturing Ltd.* (1965), 65 CLLC ¶16,052, an expansive definition accords with the purpose of the section – to preserve bargaining rights regardless of the legal form of the transaction which puts bargaining rights in jeopardy.

19. Thus, the Board has traditionally been far less concerned with the form, and more interested in the substance of the transaction or transactions in question, when making determinations under the sale of business provisions of the Act. The transfer need not be directly from the employer named in the collective agreement; it can be effected by a third party intermediary, and still constitute a sale. Nor does the intervention of a bankruptcy of the predecessor, and the subsequent sale of the bankrupt’s assets impinge on the Board’s jurisdiction to find a sale of business or part thereof: see *Vulcan Containers Ltd.*, [1997] OLRB Rep. July/August 765.

20. *Accomodex Franchise Management, supra*, provides insight into the meaning of the terms “business” and “part of a business” as they are referred to in section 69. There the Board articulated what has become commonly known as the instrumental approach to successorship. What follows are extracts from the decision which explain this approach, and the factors to be weighed in applying it:

A ‘business’ is a commercial vehicle which has been rationally constructed to produce certain goods or services for a defined market; and over the years, the Board has come to what might be described as an “operational” or “instrumental” interpretation of that term.... [paragraph 54]

...

The instrumental approach to successorship suggests that bargaining rights are attached to an economic vehicle – the mechanism, resources or facilities by which the undertaking serves its purpose – rather than the purpose itself, the employees, or their work. The Board then tries to determine, from a labour relations perspective, whether the transfer and continuation of some facet or facets of that undertaking, warrants a continuation of bargaining rights – for, of course, when interpreting section 64 [now section 69], the Board has to keep in mind its purpose and effect. The Board tries to reach a

result which is fair to both the statute and the context under review – that is, a result that appears to be called for to remedy the mischief for which section 64 was passed. That mischief is not the loss of work or work opportunities, but rather the disruption of bargaining rights which would flow from a change in the ownership but continuation of all or part of the elements that make up the business. [paragraph 55]

...

... The more the transferee's ability to carry on his business is derived from or dependent upon things acquired from the proprietor of the predecessor business, the stronger the inference [of a sale of business] will be – particularly if the predecessor has ceased to carry on its business or has withdrawn from the relevant market... [paragraph 58]

...

... in determining whether there has been a “sale” within the meaning of the Act, the Board attaches particular significance to the nature of the work performed in , and by, the business, before and after the alleged transfer. If the nature of the work performed subsequent to the transfer is substantially similar to the work performed prior to that transaction (and if the employees, or types of employees, are the same) this would normally support an inference that there has been a transfer of a business or part of a business with in the meaning of section 64 [now section 69]. [paragraph 59]

...

In considering whether a part of a business has been transferred, the Board must find that what has been transferred is “a coherent and severable ‘part’ of [the predecessor’s] economic organization – managerial, or employee skills, plant, equipment, know-how, or goodwill – thereby allowing the successor to perform a definable part of the economic function formerly performed by the predecessor. [paragraph 66]

21. Even though what passes between predecessor and alleged successor must be “coherent and severable”, it need not consist of traditional manifestations of business enterprise, such as assets, customer lists or accounts receivable. It is enough, for purposes of a section 69 finding, that the subject matter of the transfer be a coherent business, or part thereof, of the predecessor and utilized by the alleged successor to carry on its affairs. Thus, in *Thunder Bay Ambulance Services Inc.*, *supra*, the Board concluded that a sale had taken place where the successor acquired an “exclusive entitlement” to use assets previously used by the predecessor hospitals, even though title in those assets remained in the Ministry of Health.

22. In the assessment of the facts from which a sale or transfer of a business is alleged to have occurred, the Board has been particularly careful where the relationship between the predecessor and alleged successor is less than arm's length. For, as the Board in *Metropolitan Parking Inc.*, *supra*, observed at paragraph 35,

...The presence of a pre-existing relationship may suggests [sic] an artificial transaction designed to avoid bargaining obligations; or (more commonly) there may be a transaction in the nature of a business re-organization which does not alter the essential attributes of the employer-employee relationship, and which should not, having regard to the purpose of section 55 [now

section 69], disturb the collectively bargained framework for that relationship...In such circumstances it may be important to carefully examine the pre-existing links or lines of common control to which the alleged predecessor and successor are both subject. Such examination is precisely what is undertaken by the Board on an application under section 1(4); but it is also relevant on section 55 applications, and it is for this reason that applicants commonly plead section 1(4) in the alternative. It would be incorrect to make this consideration a decisive "test" for successorship, but where there is a pre-existing corporate connection between the predecessor and the successor the Board has been disposed to infer a "transfer" if there is the slightest evidence of such transaction. (See: *Zehrs Markets*, [1975] OLRB Rep. Jan. 48) ...

23. In the case before me there is no question that there were pre-existing links between Gendis, Saan and Greenberg at the time of the Greenberg bankruptcy. And there was no dispute that it was the actions of Gendis which resulted in Greenberg's insolvency, giving rise to the sale of a number of Greenberg's assets to Saan, Gendis' other retail arm. Had the Met store in Marathon been expressly included in that transaction involving the sale of certain assets from a large number of Greenberg stores to Saan, I would have been more favourably inclined to the applicant's sale of business argument. The only factor linking the Met store to the sale of the Greenberg assets is found in the acquisition by Saan of the Greenberg trademarks and trade names. That acquisition, the applicant contends, allowed Saan to open and operate a similar store in Marathon.

24. The problem with this argument is that there was no evidence before me concerning the extent, if any, to which the new Saan store in Marathon *used* the Greenberg trademarks and trade names in its business. In the complete absence of any evidence, it is not possible to say whether the Saan store actually relied upon the Greenberg trademarks and trade names, and even if it did, whether that played any significant role in Saan's ability to carry on business in Marathon. It is simply not possible to find that what Saan acquired through the bankruptcy of Greenberg, enabled it to carry on business in Marathon.

Are or were Gendis, Greenberg and Saan related companies pursuant to section 1(4) of the Act?

Section 1(4) of the Act provides as follows:

1. (1) In this Act,

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

25. Although there is much jurisprudence on the test for the application of section 1(4), for the purposes of this decision it is sufficient to refer to the decision in *Etobicoke Public Library Board, supra*, where the Board succinctly set out the test for a common employer declaration. At paragraph 81, the Board observed:

There are three conditions which must exist before a common employer declaration can be made pursuant to the Board's authority under section 1(4) of the Act. These are:

- (a) there must be more than one corporation, firm, individual, association or syndicate involved
- (b) these entities must be engaged in associated or related businesses or activities, whether or not simultaneously; and
- (c) these entities must be under common control or direction....

26. There was no dispute that the first of the three tests for a finding of a common employer declaration had been met i.e. that there were multiple entities.

27. With respect to whether Saan and Greenberg were engaged in associated or related businesses or activities, counsel for the responding parties suggested that there was no economic unity between the two entities, given the differences between them in location, size, staff complement, and so forth. There were some distinctions between Saan and Greenberg in terms of product line and services, but they were both retail stores, they both sold clothing and household products, and the markets they served did not appear to be measurably distinct. Aside from the fact that Greenberg also provided a restaurant service, there is very little distinction in the essential nature of its business compared to that of Saan.

28. Counsel for the responding parties conceded that it is not necessary to a determination as to associated or related businesses that the businesses be carried out simultaneously, but suggested that section 1(4) does not go so far as to sanction a hiatus of the kind we find here. A significant hiatus militates against a finding of associated or related businesses, particularly where those entities are not engaged in similar pursuits. Be that as it may, I have found that there is little to distinguish Saan from Greenberg in terms of its essential character, and consequently the hiatus, although lengthy, is not such as to eliminate the second component of the test to determine if there are common employers. In addition, the documentary evidence suggested a fair degree of common operating methodology and pricing between the two companies. They were also linked by the same group benefit plan under the auspices of Gendis. I find that Gendis, Greenberg and Saan were engaged in associated or related businesses.

29. I turn now to the question of whether the three companies were under common control and direction, the third component of the test for a section 1(4) declaration. Counsel for the responding parties argued that Saan and Greenberg were managed separately on a day-to-day basis. That is quite accurate, but it is not determinative of the issue. In *Walters Lithographic Company Limited, supra*, the Board considered a number of factors relevant to the issue of common control and direction, stating at paragraph 21:

The indicia or criteria which the Board considers relevant in making a determination as to whether the activities or businesses of one or more corporations, individuals, firms, syndicates or association, or any combination thereof are carried on under common direction and control and therefore may be treated as one employer are – (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. No single criterion is likely to decide the issue. Rather, as has been stated, the Board's determination undoubtedly will be based on an appraisal of all of them in the light of the

particular facts before it. It hardly need be said that in applying the above criteria, the greater the degree of functional coherence and interdependence which the Board finds among the associated or related activities and businesses the more probable it is that the Board will conclude that the entities carrying on these activities should be treated as one employer. We would mention here also that the indicia or criteria themselves obviously overlap. For that reason, in applying them to the facts of the instant case we have not attempted to deal with each criterion on an individual basis.

30. In the case before me, while there was no evidence of common management or of centralized control of labour relations, and little evidence suggesting representation to the public (other than potential investors) of an integrated enterprise, there are factors that suggest common control and direction of Saan and Greenberg by Gendis. These include the presence of two top executive officers in common on the governing boards of Gendis, the owner of the retail operation, and Greenberg and Saan, the two functioning components of that retail operation. These individuals, in their capacity as executive officers on the various boards of the three related companies, exercised a degree of financial control over them. On March 21, 1997 they were present at a meeting of the board of directors of Gendis Inc., and they voted, together with the eight other directors present at that meeting to withdraw Gendis' financial support to Greenberg, and to authorize Saan to enter into the offer to purchase with the trustee of the estate of Greenberg to acquire certain of its assets (discussed above).

31. There was also evidence of some interrelationship of operations between Greenberg, Saan and Gendis. The employees of Greenberg and Saan were entitled to participate in the Gendis pension and benefits program. The retail sales work performed by employees of Saan is similar to the work once performed by the retail sales staff of the Met store in Marathon. There appears to have been some effort by Gendis to coordinate the retail operations of both subsidiary companies so that they were not competing with one another in the same marketplace. Greenberg's operations were principally concentrated in Quebec and the maritime provinces, while Saan covered Ontario, the western provinces, the Yukon and Northwest Territories. All of this suggests that Saan and Greenberg were two interrelated sides of the Gendis retail arm.

Should the Board declare that Gendis, Greenberg and Saan were related companies?

32. In the *Etobicoke Public Library Board* case, *supra*, the Board summarized the cases dealing with the legislative purpose behind section 1(4), and observed that:

88. The principles and legislative objectives or purposes underlying section 1(4) identified by the Board in these and numerous other decisions may be conveniently summarized as follows: section 1(4) is designed

- (a) to preserve or protect from artificial erosion the bargaining rights of the union,
- (b) to create or preserve viable bargaining structures, and
- (c) to ensure direct dealings between a bargaining agent and the entity with real economic power over the employees....

33. With those principles and objectives in mind, I turn now to a consideration of the exercise of discretion under section 1(4). I have found that the evidence discloses that the first two components of the test for a section 1(4) declaration, as articulated above in the *Etobicoke*

Public Library case have been met. That is, there existed three corporate businesses, and they were engaged in associated or related activities. With respect to the third component of the test, common control and direction, there are some indicia present suggesting a finding in favour of the applicant on that point. However, as indicated, a declaration under section 1(4) of the Act involves the exercise of discretion, and if I am to exercise my discretion in favour of the union in this matter, in my view I must be persuaded that the existence of Saan and its emergence in Marathon as a result of the Gendis-initiated demise of Greenberg adversely affected the applicant's bargaining rights. Counsel for the applicant asked the Board to consider the unlikelihood of Saan, the Western Canada based arm of Gendis' retail operation, opening a business in Marathon had Greenberg's Met store continued to exist. Realistically, could the Marathon market have sustained two stores of the likes of Saan and the Met simultaneously? Counsel suggested that such a scenario was improbable, and that Saan's emergence owed everything to the bankruptcy of Greenberg, a kind of self-inflicted wound willingly suffered by Gendis for the purpose of its longer term fiscal health. Therefore, the Board should issue a related-employer declaration.

34. At first blush, counsel's argument seems compelling. It is difficult to envision the co-existence of Saan and Greenberg within the same small community. No doubt, as a practical matter, Gendis would not have adopted such a business strategy in the normal course, and indeed the evidence concerning the separate corporate structures, head offices and reporting relationships confirms that conclusion. But for the demise of the Met store in Marathon, Saan had no apparent interest in establishing its presence in the same community and market. And, as I have indicated, the Met store came to its end as a direct result of the decision of Gendis to cease funding the moribund Greenberg operation of which the Met store was a small piece. In these circumstances, given the lack of an arm's length relationship between Gendis and its two retail arms, the Board must carefully scrutinize the events in terms of the labour relations implications in deciding whether to issue a related-employer declaration under section 1(4) of the Act.

35. What was the cause of the erosion of the union's bargaining rights at the Met store in Marathon? The evidence suggests a rather simple answer. The Met store in Marathon belonged to a financially moribund or underperforming corporation whose "banker", in this case the parent company, Gendis, declined to prop it up with any further financial or other support. That is why the Met in Marathon ceased to operate. There was no serious suggestion that the short, albeit stormy labour relations history at the Met store in Marathon had anything to do with the motivation by Gendis to force Greenberg into bankruptcy and effectively close the doors of its vast collection of stores throughout Canada.

36. The union's bargaining rights in Marathon evaporated because of Greenberg's economic collapse, and not because of the emergence of Saan. True, Saan acquired a large piece of the Greenberg business. Perhaps that acquisition enabled Saan to carry on the essence of Greenberg's business outside of Marathon. But, as I have indicated, nothing from that purchase was proven in this case to have been utilized by Saan to commence to carry on business in Marathon, some two years after the closing of the Met store. Moreover, the emergence of Saan in Marathon was not inconsistent with its defined geographic operating scope – Saan had, prior to 1997, operated stores in Ontario.

37. In my view, this is not a case to which the purposes of section 1(4) apply. In particular, there has not been an *artificial* erosion of the union's bargaining rights brought about by corporate restructuring or manipulation. The union's bargaining rights came to an end because Greenberg failed as a business. Saan's emergence in Marathon, following a hiatus of almost two years, is, from a labour relations perspective, merely incidental to that failure, and

therefore is not a contributing factor to the union's loss of bargaining rights. There was an erosion of bargaining rights, but that erosion was for economic, and not labour relations, reasons.

38. For these reasons, I decline to make a declaration under section 1(4) of the Act.

39. The application in respect of Board File No. 0902-99-R is dismissed. The union is directed to advise the Board in writing, within thirty days of the date of this decision, whether or not it wishes to proceed with the unfair labour practice complaint in Board File No. 0901-99-U. In the absence of written notification by the union within 30 days, that matter will be terminated.

40. I remain seized to deal with Board File No. 0901-99-U.

"Patrick Kelly"
for the Board

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, C. C-43, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VICTORIAN ORDER OF NURSES FOR CANADA, VICTORIAN ORDER OF NURSES FOR CANADA – EASTERN REGION AND VICTORIAN ORDER OF NURSES FOR CANADA – WESTERN REGION

Court File No.: CV-15-11192-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES
(Re: Pension Matters)
(returnable August 30, 2016)

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