COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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CT- 2019-005

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PUBLIC

CT-2019-005

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Parrish & Heimbecker, Limited of certain grain elevators and related assets from Louis Dreyfus Company Canada ULC;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

PARRISH & HEIMBECKER, LIMITED

Respondent

WRITTEN SUBISSION OF THE COMMISSIONER OF COMPETITION

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1. During final argument, the Tribunal raised with counsel for both parties the following specific question of legislative interpretation:

> There are three main provisions in the Competition Act dealing with the concept of substantial lessening of competition: one is the mergers; the other is the abuse of dominance provision; the third one is civil agreements between competitors. The provisions dealing with abuse of dominance and agreement between competitors refers – in the language of the Act refers to a substantial lessening of competition in a market. Section 92 does not have the words "in a market", it has, rather, … four subparagraphs referring to "in a trade, industry or profession" and other elements. And the question we have to you: Does that have an impact on the interpretation that should be given to the application of a substantial lessening of competition, looking at the different language in that provision compared to the other provision -- a similar provision of the Act?

2. The Tribunal directed the parties to make written submissions of no more than five pages, which the parties agreed to provide by February 16, 2021. This is the Commissioner's written submission in response to the Tribunal's question.

3. Section 92 requires the Tribunal to find that "a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially: (a) in a trade, industry or profession, (b) among the sources from which a trade, industry or profession obtains a product, (c) among the outlets through which a trade, industry or profession disposes of a product, or (d) otherwise than as described in paragraphs (a) to (c)."

4. The principled approach to statutory interpretation requires s. 92 to be read in its entire context, in its grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[1]

5. The Hansard debates do not address why Parliament included the specific words "in a market" in ss. 79 and 90.1 while instead referring to in a trade, industry or profession, or otherwise, in s. 92. In light of the references to in a trade, industry or profession, or otherwise, which words must be given meaning,[2] it would be

[1] *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, at para. 26.
[2] *R. v. Kelly,* [1992] 2 S.C.R. 170, pg. 188.

inappropriate to impose a limiting effect on these subparagraphs by reading into s. 92 the words “in a market”.

6. Under all three provisions, the Tribunal’s focus is on assessing the degree to which market power is created, maintained or enhanced by the merger or conduct at issue. As has been recognized by the Tribunal in *Superior Propane*, citing the Supreme Court of Canada in *Southam*,

> The purpose of defining the relevant product market is to identify the possibility for the exercise of market power.
> …
> While market definitions should be as precise as possible within the limit of reasonableness to provide a framework within which competition implications of a transaction can be analysed, the Tribunal should not be preoccupied with market definition to the point of losing sight of the purpose of the exercise under the Act which is to determine whether the merger is likely to lead to a substantial prevention or lessening of competition. As stated by the Supreme Court of Canada in Director of Investigation and Research v. Southam Inc., [1997] 1 S.C.R. 748 at 788:
>
> > ... More generally, I notice that the Tribunal seems to have been preoccupied with the definition of the relevant market. It is possible that the members may occasionally have lost sight of the ultimate inquiry, which is whether the acquisition of the community newspapers by Southam substantially lessened competition. [3]

7. The Tribunal has recognized the challenges with precisely defining markets under s. 92.[4] In its decision in CCS, the Tribunal held:

> However, if a reasonable approximation of the likely future price cannot be demonstrated, it may be difficult for the Tribunal to clearly define the boundaries of the relevant market. In such cases, it will nevertheless be helpful for the Tribunal to be provided with sufficient evidence to demonstrate why substitutes that appear to be acceptable at the prevailing price level would or would not remain acceptable at price levels that would likely exist “but for” the merger or anti-competitive practice in question.[5]

[3] *Commissioner of Competition v. Superior Propane,* 2000 Comp. Trib. 15, Paras 47 – 48.
[4] *Canada (Commissioner of Competition)*, v. CCS Corp., [2012] CCTD No. 14, (“CCS”), para, 60.

8. The Tribunal has also recognized this in the context of s. 79 applications. In TREB, the Tribunal noted at paragraph 132:

> In carrying out such assessments of indirect indicia of substitutability, it should be recognized that it will often neither be possible nor necessary to define the product and geographic dimensions of the relevant market(s) with precision. However, an assessment must ultimately be made (at the paragraph 79(1)(c) stage of the analysis) of the extent to which products and supply locations that have not been included in the relevant market provide or would likely provide competition to the products and locations that have been included in the market (CCS at paras 59-60 and 92; Director of Investigation and Research v NutraSweet Co (1990), 32 CPR (3d) 1 (Comp. Trib.) ("NutraSweet") at p. 20). [6]

9. Further subsection 92(2) provides for the purposes of s. 92, the Tribunal shall not find that a merger or proposed merger causes or is likely to causes an SPLC solely on the basis of evidence of concentration or market share. Market definition is not an end in itself, it is merely an analytical tool that assists in the ultimate inquiry of assessing competitive effects.

10. Accordingly, the legislation does not require the Tribunal, to determine the precise meets and bounds of a relevant market or even a relevant market in determining whether a merger is likely to result in a SPLC.[7]

11. Market definition is the default exercise that informs the SPLC analysis in the context of both mergers and anti-competitive conduct. This flows naturally from the benefits of the market definition exercise in informing which products and supply locations are likely to provide relevant competition and, further, for the identification and assessment of key factors such as barriers to entry and expansion and the extent of effective remaining competition.[8] It is also clear, such as in this Application, that there are times where the exercise may hinder the analysis of the competitive implications of the merger or conduct.

[6] *The Commissioner of Competition v. The Toronto Real Estate* Board, 2016 Comp Trib. 17, ("TREB"), para. 132.
[7] CCS, para. 92.
[8] In fact ss. 93(e), (g), and (h) are factors the Tribunal considers that explicitly reference "in a market" or "in a relevant market".

12. Indeed, the current Application is an excellent example of why the Tribunal should be wary of allowing market definition to obscure local competitive effects. The Commissioner's position is that the relevant markets are the provision of grain handling services to those farmers who benefited from competition between the Moosomin and Virden Elevators.[9] However, the Commissioner has consistently argued, from the pleadings[10] through to final argument[11], that the price effects of the Acquisition are material regardless of market definition.

13. The evidence demonstrates that this Acquisition impacts local competition between Elevators that affects one component, the basis price, of the net price received by farmers for their grain.[12] The basis price is a relatively small component of the net price.[13] P&H should not be able to obscure the anticompetitive effects of its Acquisition simply because they occupy a space in the value chain that impacts only a small component of the net price.[14]

14. In this case, Dr. Miller has calculated that the merger provides P&H with the ability to increase the basis component it charges at Moosomin for wheat by $■■■ MT for canola by $■■■ MT to $■■■ MT depending on whether crushers are included or excluded from the model.[15] These absolute price effects are the same regardless of market definition.[16]

15. In assessing whether these price effects, along with all the other evidence referenced and arguments made in the Commissioner's final written and oral argument, are material and likely to result in a SPLC under s. 92, the Tribunal has

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[9] Defined terms have the same meaning as in the Commissioner's final argument.
[10] Reply of the Commissioner of Competition, paras. 5-7.
[11] Closing Argument of the Commissioner, paras. 107 – 115.
[12] Closing Argument of the Commissioner, paras. 4, 12, 28, 31 and 65.
[13] Closing Argument of the Commissioner, paras. 3-4.
[14] Closing Argument of the Commissioner, para. 69.
[15] CA-A-170, Expert Report of Dr. Nathan Miller (Conf A), p. 76, Exhibit 14.
[16] Closing Argument of the Commissioner, para. 107.

used 5% of total price as a benchmark for assessing materiality. However, as Chief Justice Crampton explained in CCS, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downward when a 5% price increase is used to assess the degree of market power held by a hypothetical monopolist for the purposes of a SSNIP.[17] One intuitive way to think about doing this recalibration in the context of this case, where local competition is a small component of the total net price of the grain, would be to use that percentage (the basis as a percentage of the net price) to scale down the 5% price increase used in the SSNIP.

16. Because s. 92 is concerned simply with a SLPC the Tribunal can assess the impact on competition as described above and in the Commissioner's final argument with or without defining a relevant market.

[17] CCS, paras. 376-377.

PUBLIC

28227

Supreme Court of Canada Cour suprême du Canada

02 119 141

Bell ExpressVu Limited Partnership

- v. -

Richard Rex, Richard Rex, c.o.b. as 'Can-Am Satellites', Richard Rex, 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

- 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 (B.C.) (28227)

CORAM:
The Honourable Mme Justice L'Heureux-Dubé
The Honourable Mr. Justice Iacobucci
The Honourable Mr. Justice Major
The Honourable Mr. Justice Bastarache
The Honourable Mr. Justice Binnie
The Honourable Madam Justice Arbour
The Honourable Mr. Justice LeBel

Bell ExpressVu Limited Partnership

- 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, Mme 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

- 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 (C.-B.) (28227)

CORAM:
L'honorable juge L'Heureux-Dubé
L'honorable juge Iacobucci
L'honorable juge Major
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge Arbour
L'honorable juge LeBel

Appeal heard: December 4, 2001	Appel entendu: Le 4 décembre 2001
Judgment rendered: April 26, 2002	Jugement rendu: Le 26 avril 2002
Reasons for judgment by: The Honourable Mr. Justice Iacobucci	Motifs de jugement: L'honorable juge Iacobucci
Concurred in by:	Souscrivent à l'avis de l'honorable juge Iacobucci:
The Honourable Mme Justice L'Heureux-Dubé The Honourable Mr. Justice Major The Honourable Mr. Justice Bastarache The Honourable Mr. Justice Binnie The Honourable Madam Justice Arbour The Honourable Mr. Justice LeBel	L'honorable juge L'Heureux-Dubé L'honorable juge Major L'honorable juge Bastarache L'honorable juge Binnie L'honorable juge Arbour L'honorable juge LeBel
Counsel at hearing:	Avocats à l'audience:
For the appellant: Eugene Meehan Jessica Duncan K. William McKenzie	Pour l'appelante: Eugene Meehan Jessica Duncan K. William McKenzie
For the respondents Richard Rex et al.: Alan D. Gold	Pour les intimés Richard Rex et autres: Alan D. Gold
For the respondent Michelle Lee: Maureen McGuire	Pour l'intimée Michelle Lee: Maureen McGuire
For the intervener the Attorney General of Canada: Christopher Rupar Graham R. Garton, Q.C.	Pour l'intervenant le Procureur général du Canada: Christopher Rupar Graham R. Garton, c.r.
For the intervener the Canadian Motion Picture Distributors Association: Roger T. Hughes, Q.C.	Pour l'intervenante l'Association canadienne des distributeurs de films: Roger T. Hughes, c.r.

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Davit D. Akman
Jeffrey D. Vallis

Pour l'intervenante DIRECTV Inc.:
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Jeffrey D. Vallis

For the intervener the Canadian Alliance for Freedom of Information and Ideas:
Ian W.M. Angus

Pour l'intervenante Canadian Alliance for Freedom of Information and Ideas:
Ian W.M. Angus

For the intervener the Congres Iberoamericain du Canada:
Alan Riddell

Pour l'intervenant Congres Iberoamericain du Canada:
Alan Riddell

Citations	Références
B.C.C.A.: (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.	C.A. (C.-B.) : (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.
B.C.S.C.: [1999] B.C.J. No. 3092 (QL).	C.S. (C.-B.) : [1999] B.C.J. No. 3092 (QL).

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *Bell ExpressVu v. Rex*, 2002 SCC 42. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *Bell ExpressVu v. Rex*, [2002] x S.C.R. xxx, 2002 SCC 42.

RÉFÉRENCE

Avant la publication de ce jugement dans le R.C.S., il faut utiliser sa référence neutre : *Bell ExpressVu c. Rex*, 2002 CSC 42. Après sa publication dans le R.C.S., la référence neutre sera utilisée comme référence parallèle : *Bell ExpressVu c. Rex*, [2002] x R.C.S. xxx, 2002 CSC 42.

bell expressvu *v.* rex

Bell ExpressVu Limited Partnership *Appellant*

v.

Richard Rex, Richard Rex, c.o.b. as 'Can-Am Satellites', Richard Rex, c.o.b. as 'Can Am Satellites' and c.o.b. as 'CanAm Satellites' and c.o.b. as 'Can Am Satellite' and c.o.b. as 'Can Am Sat' and c.o.b. as 'Can-Am Satellites Digital Media Group' and c.o.b. as 'Can-Am Digital Media Group' and c.o.b. as 'Digital Media Group', Anne Marie Halley a.k.a. Anne Marie Rex, Michael Rex a.k.a. Mike Rex, Rodney Kibler a.k.a. Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, John Doe 1 to 20, Jane Doe 1 to 20 and any other person or persons found on the premises or identified as working at the premises at 22409 McIntosh Avenue, Maple Ridge, British Columbia, who operate or work for businesses carrying on business under the name and style of 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group', 'Digital Media Group', or one or more of them. *Respondents*

and

The Attorney General of Canada, the Canadian Motion Picture Distributors Association, DIRECTV, Inc., the Canadian Alliance for Freedom of Information and Ideas, and the Congres Iberoamericain du Canada *Interveners*

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

Neutral citation: 2002 SCC 42.

File No.: 28227.

2001: December 4; 2002: April 26.

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

on appeal from the court of appeal for british columbia

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

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

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

The appellant engages in the distribution of direct-to-home (DTH) television programming and encrypts its signals to control reception. The respondents sell decoding systems to Canadian customers that enable them to receive and watch U.S. DTH progamming. They also provide U.S. mailing addresses to their customers who do not have one, since the U.S. broadcasters will not knowingly authorize their signals to be decoded by persons outside the United States. The appellant, as a licensed distribution undertaking, brought an action in the British Columbia Supreme Court, pursuant to ss. 9(1)(*c*) and 18(1) of the *Radiocommunication Act*, requesting in

part an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. Section 9(1)(*c*) enjoins the decoding of encrypted signals without the authorisation 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.

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 unauthorised

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 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 (*sub nom. R. v. D'Argy*), 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 (*sub nom. R. v. O'Connor*) (1995), 106 Man. R. (2d) 37, leave ref'd (1996), 110 Man. R. (2d) 153; *R. v. King*, [1996] N.B.J. No. 449 (QL), rev'd (*sub nom. King v. Canada (Attorney General)*) (1997), 187 N.B.R. (2d) 185; *R. v. Knibb* (1997), 198 A.R. 161, aff'd (*sub nom. R. v. Quality Electronics (Taber) Ltd.*), [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; *Stubart 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 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 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, January 24, 2002; *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 SCC 83; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 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.

Statutes and Regulations Cited

Broadcasting Act, Direction to the CRTC (Ineligibility of Non-Canadians), SOR/96-192.

Broadcasting Act, S.C. 1991, c. 11, ss. 2(1) "broadcasting", "broadcasting undertaking", "distribution undertaking", (2) [am. 1993, c. 38, s. 81], (3), 3.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 33.

Copyright Act, R.S.C. 1985, c. C-42, ss. 21[rep. 1994, c. 47, s. 59; ad. 1997, c. 24, s. 14], 31 [rep. R.S., c. 10 (4th Supp.), s. 7; ad. (s. 28.01 renumbered as s. 31), 1997, c. 24, s. 16] (2) [ad. 1988, c. 65, s. 63].

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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]; 10(2.1) [ad. 1991, c. 11, s. 84], (2.5) [*idem*], 18 [ad. 1991, c. 11, s. 85] (1)(*a*), (*c*), (6).

Rules of the Supreme Court of Canada, SOR/83-74, Rule 32.

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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 from 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.

Robert T. Hughes, Q.C., for the intervener the Canadian Motion Picture Distributors Association.

Christopher D. Bredt, *Jeffrey D. Vallis*, and *Davit D. Akman*, for the intervener DIRECTV, Inc.

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

Alan Riddell, for the intervener the Congres Iberoamerican du Canada.

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

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

PUBLIC

SUPREME COURT OF CANADA

BELL EXPRESSVU LIMITED PARTNERSHIP

v.

RICHARD REX, RICHARD REX, c.o.b. as 'CAN-AM SATELLITES', RICHARD REX, 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.

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

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

IACOBUCCI J. --

I. Introduction

1 This appeal involves an issue that has divided courts in our country. It concerns the proper interpretation of s. 9(1)(*c*) of the *Radiocommunication 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 unauthorised decoding of signals that emanate from licensed Canadian distributors.

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

II. Background

3 The appellant is a limited partnership engaged in the distribution of direct-to-home ("DTH") television programming. It is one of two current providers licensed by the Canadian Radio-television and Telecommunications Commission ("CRTC") as a DTH distribution undertaking under the *Broadcasting Act*, S.C. 1991, c. 11. There are two similar DTH satellite television distributors in the United States, neither of

which possesses a CRTC licence. The door has effectively been shut on foreign entry into the regulated Canadian broadcast market since April 1996, when the Governor in Council directed the CRTC not to issue, amend or renew broadcasting licences for non-Canadian applicants (SOR/ 96-192). The U.S. companies are, however, licensed by their country's Federal Communications Commission to broadcast their signals within that country. The intervener DIRECTV is the larger of these two U.S. companies.

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 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.

7 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.

8 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.

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;
>
> ...
>
> **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.

...

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*,

...

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 temporary residence or dwelling unit or to another such undertaking;

(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.

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

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

(*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;

...

(*d*) the Canadian broadcasting system should

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

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

(*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

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

12 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 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.

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.

15 Section 9(1)(*c*) enjoins the decoding of encrypted signals without the authorization of the "lawful distributor of <u>the</u> 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". 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.

16 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 program signal", the majority held that "the fact that a subscription programming 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).

17 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 *Charter* (para. 44). Finding no error in the chambers judge's interpretation, the majority dismissed the appeal.

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 distinctive 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 (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

21 This appeal raises three issues:

1. Does s. 9(1)(*c*) of the *Radiocommunication Act* create an absolute prohibition against decoding, followed by a limited exception, or does it allow all decoding, except for those signals for which there is a lawful distributor who has not granted its authorization?

2. Is s. 9(1)(*c*) of the *Radiocommunication Act* inconsistent with s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

3. If the answer to the above question is "yes", can the statutory provision be justified pursuant to s. 1 of the *Charter*?

VI. Analysis

A. *Introduction*

22 It is no exaggeration to state that s. 9(1)(*c*) of the federal *Radiocommunication Act* has received inconsistent application in the courts of this country. On one hand, there is a series of cases interpreting the provision (or suggesting that it might be interpreted) so as to create an absolute prohibition, with a limited exception where authorization from a lawful Canadian distributor is received: *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (QL) (Prov. Ct.), at para. 36, aff'd (*sub nom. R. v. O'Connor*) (1995), 106 Man. R. (2d) 37 (Q.B.), 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.); *R. v. Knibb* (1997), 198 A.R. 161 (Prov. Ct.), aff'd (*sub nom. R. v. Quality Electronics (Taber) Ltd.)*, [1998] A.J. No. 628 (QL) (Q.B.); *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 para. 81.

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 (*sub nom. R. v. D'Argy)*, Sup. Ct. (Drummondville), No. 405-36-000044-003, June 13, 2001; *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. Scullion*, [2001] R.J.Q. 2018 (C.Q.); *R. v. Branton* (2001), 53 O.R. (3d) 737 (C.A.).

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

25 In attempting to steer its way through this maze of cases, the Court of Appeal for British Columbia, in my respectful view, erred in its interpretation of s. 9(1)(*c*). In my view, there are five aspects of the majority's decision that warrant discussion. First, it commenced analysis from the belief that an ambiguity existed. Second, it placed undue emphasis on the sheer number of judges who had disagreed as to the proper interpretation of s. 9(1)(*c*). Third, it did not direct sufficient attention to the context of the *Radiocommunication Act* within the regulatory *régime* for broadcasting in Canada, and did not consider the objectives of that *régime*, feeling that it was unnecessary to address these "wider policy issues". Fourth, the majority did not read s. 9(1)(*c*) grammatically in accordance with its structure, namely, a prohibition with a limited exception. Finally, the majority of the court effectively inverted the words of the provision, such that the signals for which a lawful distributor could

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provide authorization to decode (i.e., the exception) defined the very scope of the prohibition.

B. *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?*

(1) Principles of Statutory Interpretation

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

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

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 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 people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, *per* Lamer C.J.)

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

29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminister Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

30 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.

(a) *Grammatical and Ordinary Sense*

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

> No person shall
>
> ...
>
> (*c*) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with authorization from the lawful distributor of the signal or feed. [Emphasis added.]
>
> 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 programming signal") of the prohibition, and then announces an exception to it ("otherwise than under and in accordance with 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).

33 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.

34 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 "one, some [or] any" (*Canadian Oxford Dictionary* (1998)). 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. Subsection 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 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.

37 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.

38 In my opinion, therefore, the definition of "subscription programming signal" encompasses signals originating from foreign distributors and intended for reception by a foreign public. Again, because the *Radiocommunication Act* does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(*e*), which forbids their unauthorized retransmission within Canada) and only concerns decrypting that occurs in the s. 3(3) locations, this does not give rise to any extra-

territorial exercise of authority. At this stage, what this means is that, contrary to the holdings of the chambers judge and the majority of the Court of Appeal in the instant case, Parliament did in fact choose language in s. 9(1)(*c*) that prohibits the decoding of all encrypted subscription signals, regardless of their origin, "otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed". I shall now consider this exception.

39 The Court of Appeal relied upon the definite article found in this portion of s. 9(1)(*c*) ("the signal"), in order to support its narrower reading of the provision. Before this Court, counsel for the respondents submitted as well that the definite article preceding the words "lawful distributor" confirms that the provision "is only intended to operate where there is a lawful distributor". Finally, the respondents draw to our attention the French language version of the provision, and particularly the word « leur » that modifies « distributeur légitime »: a number of cases considering the French version of s. 9(1)(*c*) have relied upon that word to arrive at the narrower interpretation (see the Court of Quebec judgments in *Thériault*, *supra*, at p. 2739; *Gregory Électronique Inc.*, *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" (para. 36), I cannot see how it necessarily follows that

decoding unregulated signals "cannot therefore be in breach of the *Radiocommunication Act*". Such an approach would require one to read words from the exception into the prohibition, which is circular and incorrect. Again, as Provost C.Q.J. stated in *Pearlman*, *supra*, at p. 2031: [TRANSLATION] "To seek the meaning of the exception at the outset, and thereafter to define the rule by reference to the exception, is likely to distort the meaning of the text and misrepresent the intention of its author."

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

42 Although I have already stated that the U.S. DTH distributors in the present case are not "lawful distributors" under the Act, I should discuss this term, because it is important to the interpretive process. Section 2 provides that a "lawful distributor" of an encrypted subscription programming signal is "a person who has the lawful right in Canada to transmit it and authorize its decoding". In this connection, the fact that a person is authorized to transmit programming in another country does not, by that fact alone, qualify as granting the lawful right to do so in Canada. Moreover, the

phrase "lawful right" (« 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 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 authorisation 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 radiocommunication, which includes encrypted broadcast programming signals of the sort at issue. S. Handa et al., *Communications Law in Canada* (loose-leaf ed.), at p. 3.8, describe the *Radiocommunication Act* as one "of the three statutory pillars governing carriage in Canada". These same authors note at p. 3.17 that:

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

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

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

> The *Broadcasting Act* and the *Radiocommunication Act* must be seen as operating together as part of a single regulatory scheme. The provisions of each statute must accordingly be read in the context of the other and 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 in and sweep all of that aside? What purpose would have been served?

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

50 There is another contextual factor that, while not in any way determinative, is confirmatory of the interpretation of s. 9(1)(*c*) as an absolute prohibition with a limited exception. As I have noted above, the concept of "lawful right" in the definition of "lawful distributor" incorporates contractual and copyright issues. According to the evidence in the present record, the commercial agreements between the appellant and its various programme suppliers require the appellant to respect the

rights that these suppliers are granted by the persons holding the copyright in the programming content. The rights so acquired by the programme suppliers permit the programmes to be broadcast in specific locations, being all or part of Canada. As such, the appellant would have no lawful right to authorise decoding of its programming signals in an area not included in its geographically limited contractual right to exhibit the programming.

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

52 I also believe that the reading of s. 9(1)(*c*) as an absolute prohibition with a limited exception complements the scheme of the *Copyright Act*. Sections 21(1)(*c*) and 21(1)(*d*) of the *Copyright Act* provide broadcasters with a copyright in the communication signals they transmit, granting them the sole right of retransmission (subject to the exceptions in s. 31(2)) and, in the case of a television communication signal, of performing it on payment of a fee. By reading s. 9(1)(*c*) as an absolute prohibition against decoding except where authorization is granted by the person with the lawful right to transmit and authorize decoding of the signal, the provision extends protection to the holders of the copyright in the programming itself, since it would proscribe the unauthorized reception of signals that violate copyright, even where no

retransmission or reproduction occurs: see F. P. Eliadis and S. C. McCormack, "Vanquishing Wizards, Pirates and Musketeers: The Regulation of Encrypted Satellite TV Signals" (1993), 3 *M.C.L.R.* 211, at pp. 213-18. Finally, I note that the civil remedies provided for in ss. 18(1)(*a*) and 18(6) of the *Radiocommunication Act* both illustrate that copyright concerns are of relevance to the scheme of the Act, thus supporting the finding that there is a connection between these two statutes.

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

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

54 Section 9(1)(*c*) does have a "dual aspect", in so far as it gives rise to both civil and criminal penalties. I am not, however, persuaded that this plays an important role in the interpretive process here. In any event, I do not think it correct to insinuate that the decision in this appeal will have the effect of automatically branding every Canadian resident who subscribes to and pays for U.S. DTH broadcasting services as a criminal. The penal offence in s. 10(1)(*b*) requires that circumstances "give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9" (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 intervene: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 49, *per* L'Heureux-Dubé J.; see also B.A. Crane and H.S. Brown, *Supreme Court of Canada Practice 2000* (1999), at p. 253. Rule 32 also serves to advise the parties and other potential interveners of the constitutional issues before the Court.

58 On the whole, the parties to an appeal are granted "wide latitude" by the Chief Justice or other judge of this Court in formulating the questions to be stated: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 71; *Corbiere*, *supra*, at para. 48. This wide latitude is especially appropriate in a case like the present, where the motion to state constitutional questions was brought by the respondents: generally, a respondent may advance any argument on appeal that would support the judgment below (*Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 240; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 643-44, *per* Cory J.). Like many general rules, however,

this one is subject to an exception. A respondent, like any other party, cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial: *Perka*, *supra*; *Idziak*, *supra*; *R. v. Gayle* (2001), 54 O.R. (3d) 26 (C.A.), at para. 69, leave to appeal refused January 24, 2002.

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

60 Respondents' counsel properly conceded during oral argument that there is no *Charter* record permitting this Court to address the stated questions. Rather, he argued that "*Charter* values" must inform the interpretation given to the *Radiocommunication Act*. This submission, inasmuch as it is presented as a stand alone proposition, must be rejected. Although I have already set out the preferred

approach to statutory interpretation above, the manner in which the respondents would have this Court consider and apply the *Charter* warrants additional attention at this stage.

61 It has long been accepted that, where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603, *per* McIntyre J.; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, 2001 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 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.

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

63 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; *R. v. Sharpe*, *supra*, at para. 33.

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

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

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

66 To reiterate what was stated in *Symes* 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 <u>this</u> sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As

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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.

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

VII. Disposition

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

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scc Thu, Jan 18, 2001 leave to appeal granted
Gonthier, Binnie and Arbour JJ.
(2001), 191 D.L.R. (4th) vi; 267 N.R. 194 n; 146 O.A.C. 198 n

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William Thomas Kelly *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. *v.* KELLY

File No.: 21719.

1991: October 31; 1992: June 11.

Present: L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson* and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Secret commissions — Elements of offence — Accused acting as financial investment advisor selling housing units to his clients — Commissions paid to accused by development company for sale of units not disclosed to clients — Whether accused guilty of corruptly accepting a reward or benefit under s. 426(1)(a) of Criminal Code — Whether Crown required to prove existence of corrupt bargain between giver and taker — Meaning of word "corruptly" — Criminal Code, R.S.C., 1985, c. C-46, s. 426(1)(a).

The accused was charged with four counts of corruptly accepting a reward or benefit contrary to s. 426(1)(*a*) of the *Criminal Code*. He was one of the principals of a company ("KPA") which offers, for a fee, financial planning services, including advice respecting investment in real estate and tax planning strategies. In 1980, the accused persuaded a property development company to give KPA the exclusive right to sell the units of its MURB project. KPA sold all the units, mainly to its clients, within the relatively short time prescribed in the agreement and received a commission from the development company for each unit sold. These commissions were the same as those which the development company would have paid to any salesman. At trial, the evidence indicated that KPA's clients were unaware of the commissions paid by the development company to KPA. At their initial meeting with new clients, KPA only gave vague and general information as to its sources of remuneration on a "white board". The accused himself later advised his associates

* Stevenson J. took no part in the judgment.

William Thomas Kelly *Appelant*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ: R. *c.* KELLY

N° du greffe: 21719.

1991: 31 octobre; 1992: 11 juin.

Présents: Les juges L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson* et Iacobucci.

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

Droit criminel — Commissions secrètes — Éléments de l'infraction — Vente par l'accusé agissant à titre de conseiller en placements d'unités d'habitation à ses clients — Non-divulgation aux clients des commissions versées à l'accusé par la société immobilière relativement à la vente des unités — L'accusé est-il coupable, en vertu de l'art. 426(1)a) du Code criminel, d'avoir, par corruption, accepté une récompense ou un bénéfice? — Le ministère public est-il tenu de prouver l'existence d'une affaire entachée de corruption entre le donneur et l'acceptant? — Signification de l'expression «par corruption» — Code criminel, L.R.C. (1985), ch. C-46, art. 426(1)a).

L'accusé a fait l'objet de quatre chefs d'accusation d'avoir, par corruption, accepté une récompense ou un bénéfice en contravention de l'al. 426(1)*a*) du *Code criminel*. Il était l'un des dirigeants d'une société («KPA») qui offre, moyennant des frais, des services de planification financière, y compris des conseils en placements immobiliers ainsi que des renseignements sur des stratégies de planification fiscale. En 1980, l'accusé a convaincu une société immobilière de consentir à KPA le droit exclusif de vente des unités de son projet d'IRLM. KPA a vendu toutes les unités, principalement à ses clients, dans le délai relativement court prévu dans l'entente et a reçu une commission de la société immobilière pour chacune des unités vendues. Les commissions étaient les mêmes que celles que la société immobilière aurait versées à tout vendeur. En première instance, la preuve a révélé que les clients de KPA ne savaient pas que celle-ci recevait des commissions de la société immobilière. Lors de la première rencontre avec un client, KPA inscrivait sur un «tableau blanc» seulement

* Le juge Stevenson n'a pas pris part au jugement.

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that, with respect to the MURB project, he did not want further disclosures in writing. In defence, the accused testified that the clients purchasing the MURB units should have known of the commissions to be paid to KPA from two small references in the Offering Memoranda on the "Issuing and Sales Costs". The accused was convicted on all four counts. The trial judge found that he had an obligation to make full, frank and fair disclosure of the sales commission. The majority of the Court of Appeal affirmed the conviction. The question raised on this appeal is what the Crown must prove in order to obtain a conviction pursuant to s. 426(1)(*a*) of the *Criminal Code*. In particular, this Court must determine whether s. 426 has any application where the party making the payments was not part of a corrupt bargain with the taker.

des renseignements vagues et généraux sur ses grandes sources de rémunération. L'accusé a lui-même avisé ses associés qu'il ne voulait pas donner davantage de précisions écrites relativement au projet d'IRLM. En défense, l'accusé a témoigné que les deux courtes mentions traitant des «Frais d'émission et de vente» dans la notice d'offre auraient dû permettre aux clients acheteurs d'IRLM de savoir que KPA recevait des commissions. L'accusé a été déclaré coupable relativement aux quatre chefs d'accusation. Le juge du procès a conclu que l'accusé avait l'obligation de divulguer les commissions d'une manière complète, franche et impartiale. La Cour d'appel à la majorité a confirmé la déclaration de culpabilité. La question soulevée dans le présent pourvoi est de savoir quels sont les éléments que le ministère public doit prouver pour obtenir une déclaration de culpabilité en vertu de l'al. 426(1)*a*) du *Code criminel*. Il s'agit tout particulièrement de déterminer si l'art. 426 est applicable dans le cas où l'auteur des paiements n'a pas conclu une affaire entachée de corruption avec l'acceptant.

Held (Sopinka J. dissenting): The appeal should be dismissed.

Arrêt (le juge Sopinka est dissident): Le pourvoi est rejeté.

Per L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: In preserving the integrity of the agency relationship and protecting the vulnerable principals, s. 426 of the *Code* acknowledges the importance of that relationship in our society. There are three elements to the *actus reus* of the offence set out in s. 426(1)(*a*)(ii) as they apply to an accused agent/taker with regard to the acceptance of a commission: (1) the existence of an agency relationship; (2) the accepting by the agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principal; and (3) the failure by the agent to make adequate and timely disclosure of the source, amount and nature of the benefit. The word "corruptly" adds that third element to the *actus reus* of the offence. This word in the context of secret commissions means secretly or without the requisite disclosure. The Crown is not required to prove the existence of a corrupt bargain between the giver and the taker of the reward or benefit. It is thus possible to convict a taker despite the innocence of the giver.

Les juges L'Heureux-Dubé, Gonthier, Cory et Iacobucci: En préservant l'intégrité du mandat et en protégeant les commettants vulnérables, l'art. 426 du *Code* reconnaît l'importance du rapport que le mandat implique dans notre société. L'*actus reus* de l'infraction prévue au sous-al. 426(1)*a*)(ii) comporte trois éléments qui devront être établis en cas d'accusation contre un agent-acceptant relativement à l'acceptation d'une commission: (1) l'existence d'un mandat; (2) l'acceptation par l'agent d'un bénéfice à titre de contrepartie pour faire ou s'abstenir de faire un acte relatif aux affaires de son commettant; et (3) l'omission de la part de l'agent de divulguer d'une façon appropriée et en temps opportun la source, le montant et la nature du bénéfice. L'expression «par corruption» ajoute ce troisième élément à l'*actus reus* de l'infraction. Dans le contexte des commissions secrètes, cette expression signifie qu'elles ont été versées secrètement ou qu'elles n'ont pas été divulguées comme il se doit. Le ministère public n'est pas tenu de prouver l'existence d'une affaire entachée de corruption entre le donneur et l'acceptant de la récompense ou du bénéfice. L'acceptant peut donc être déclaré coupable malgré l'innocence du donneur.

The requisite *mens rea* must also be established for each element of the *actus reus*. Pursuant to s. 426(1)(*a*)(ii), an accused agent/taker (1) must be aware of the agency relationship, (2) must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal, and

La *mens rea* requise doit aussi être établie pour chacun des éléments de l'*actus reus*. Conformément au sous-al. 426(1)*a*)(ii), l'agent-acceptant accusé doit: (1) être au courant de l'existence du mandat; (2) avoir accepté sciemment le bénéfice à titre de contrepartie pour un acte à être fait relativement aux affaires du com-

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(3) must be aware of the extent of the disclosure to the principal or lack thereof. When an accused is aware that some disclosure was made, the court must determine whether, in all the circumstances of the particular case, the disclosure was in fact adequate and timely.

Here, the Crown has established all the elements requisite for conviction under s. 426. It is clear that an agency relationship existed between the accused and his clients and that he was aware of the existence of that relationship. It is also clear that the nature of the commission paid by the development company was to encourage the accused to influence his clients to purchase the MURB units and that he was aware of this intention. He accepted the commission secretly and influenced the affairs of his principals. Finally, the payment of the commission was not disclosed in an adequate and timely manner. At the time of the sales, KPA's clients were not aware that KPA would receive a sales commission from the development company for each MURB unit sold to KPA clients. KPA disclosure of its sources of remuneration was vague and general and did not meet the objectives of s. 426. The accused himself made a conscious decision to limit the extent of the disclosure. While the Offering Memoranda for the MURB units contained two one-line references to "Issuing and Sales Costs" for the projects, there was no specific reference to the fact that it was the accused who was to receive these costs as a commission.

Per McLachlin J.: Lack of disclosure is an element of the *actus reus* of the offence of taking a secret commission under s. 426(1)(*a*)(ii) of the *Code*, and awareness of that lack of disclosure is an element of its *mens rea*. No corrupt bargain is required. However, since criminal law must be certain and definitive, the time and the degree of disclosure must be clearly defined. Agents must be given fair notice in advance whether a proposed course of conduct is criminal. With respect to the timing of disclosure, certainty requires that where the gravamen of the offence is the taking of a secret commission disclosure to the principal must be made by the time the commission is accepted. If the agent accepts a commission without beforehand (or simultaneously) advising the principal of the fact, the offence is established. With respect to the degree of disclosure, it is not enough to state at the beginning of a relationship between an agent and his principal that commissions may from time to time be taken. The requirements of s. 426(1)(*a*)(ii) will only be satisfied if the agent discloses to the principal that he will receive a commission with respect to the

mettant; et (3) être au courant de l'étendue de la divulgation au commettant ou de l'absence de divulgation. Si l'accusé savait qu'il y a eu divulgation, il reviendra alors à la cour de déterminer si, compte tenu de toutes les circonstances de l'affaire, elle a été faite de façon appropriée et en temps opportun.

En l'espèce, le ministère public a prouvé tous les éléments requis pour obtenir une déclaration de culpabilité en vertu de l'art. 426. Il n'y a pas de doute qu'il y avait un mandat entre l'accusé et ses clients et que l'accusé était au courant de l'existence de ce mandat. En outre, de toute évidence, la commission payée par la société immobilière visait à inciter l'accusé à influencer ses clients pour qu'ils achètent les unités d'IRLM, et l'accusé était au courant de cette intention. Il a accepté la commission secrètement et a influencé les affaires de ses commettants. Enfin, le paiement de la commission n'a pas été divulgué d'une façon appropriée et en temps opportun. Au moment des ventes, les clients de KPA ne savaient pas que KPA recevrait une commission de la société immobilière relativement à la vente de chaque unité d'IRLM vendue aux clients de KPA. La divulgation faite par KPA de ses sources de rémunération était vague et générale et ne satisfait pas aux objectifs de l'art. 426. L'accusé a pris consciemment la décision de restreindre la divulgation. Bien que les notices d'offre pour les IRLM renfermaient deux mentions d'une ligne traitant des «Frais d'émission et de vente» pour les projets, il n'y avait aucune mention expresse du fait que c'était l'accusé qui devait recevoir ces frais à titre de commissions.

Le juge McLachlin: L'absence de divulgation constitue un élément de l'*actus reus* de l'infraction d'acceptation d'une commission secrète aux termes du sous-al. 426(1)*a*)(ii) du *Code* et la connaissance de cette absence de divulgation est un élément de la *mens rea*. Il n'est pas nécessaire que l'affaire soit entachée de corruption. Cependant, puisque le droit pénal doit être précis et définitif, le moment et l'étendue de la divulgation doivent être clairement définis. L'agent doit recevoir un avertissement suffisant que l'acte qu'il se propose d'accomplir est criminel. En ce qui a trait au moment de la divulgation, pour qu'il y ait certitude lorsque l'élément essentiel de l'infraction est l'acceptation d'une commission secrète, il faut que la divulgation au commettant soit faite au moment où la commission est acceptée. Si l'agent accepte une commission sans en informer le commettant au préalable (ou simultanément), l'infraction est commise. En ce qui concerne l'étendue de la divulgation, il n'est pas suffisant de mentionner au début d'une relation entre un agent et son commettant qu'il pourra y avoir acceptation de commissions à l'occasion.

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transaction in question. The amount of the commission is secondary and need not be disclosed in order to escape liability. The communication that the agent will receive a commission with respect to the particular transaction in issue will put the principal on notice that the agent is in a potential conflict of interest. Here, since there was no disclosure of the particular commission to the principals involved, the offence is made out.

Per Sopinka J. (dissenting): When an agent is charged with accepting a benefit under s. 426(1)(*a*)(ii) of the *Code*, it must be established that he accepted the benefit as a *quid pro quo* to influence him. To secure a conviction, the Crown must prove two essentials of the mental element of the offence: (1) that the benefit was so accepted with the agent's knowledge or belief that it was given for the purpose of influencing him; and (2) that the agent entered into the transaction *mala fide*. The first requirement looks to the state of mind of the agent at the time of the transaction. The corruption in this action is the belief that the valuable consideration is intended to influence the agent to show favour to some person in relation to the affairs of his principal. The taker is thus caught even if he was mistaken as to the true intention of the giver. The offence is complete without the necessity of showing that the agent was in fact influenced in his actions. It is his state of mind in accepting the consideration that is crucial. The second requirement is most easily satisfied through proof of dishonesty. Non-disclosure by the taker is not synonymous with the terms "corruptly" or *mala fides*, although it may be a strong indicator that the agent has acted in bad faith. In some situations disclosure or the intent to disclose will be highly relevant.

In this case, the accused should be acquitted. While he sold most of the units to his clients, that was not because he was influenced by the development company to do so nor because he believed that this was the intended purpose of either the agreement with that company or the payments. The agreement was entered into at arm's length, the commissions were the same amount as was paid to any other salesmen and they were to be paid regardless of to whom the units were sold. The decision to sell to his clients was one that the accused made unilaterally. His failure to make full disclosure

Les exigences du sous-al. 426(1)*a*)(ii) ne seront satisfaites que si l'agent dit au commettant qu'il recevra une commission relativement à l'opération en question. Le montant de la commission est secondaire et n'a pas à être divulgué pour fins d'exonération. La divulgation au commettant du fait que l'agent recevra une commission relativement à une opération donnée l'informera que l'agent risque d'être dans une situation de conflit d'intérêts. En l'espèce, il n'y a eu aucune divulgation des commissions aux commettants en cause. En conséquence, il y a eu perpétration de l'infraction.

Le juge Sopinka (dissident): Lorsqu'un agent est accusé, en vertu du sous-al. 426(1)*a*)(ii) du *Code*, d'avoir accepté une récompense ou un bénéfice, il faut démontrer qu'il l'a accepté à titre de contrepartie pour l'influencer. Pour obtenir une déclaration de culpabilité, le ministère public doit démontrer deux points essentiels de l'élément moral de l'infraction: (1) que l'agent savait ou croyait que le bénéfice qu'il a accepté visait à l'influencer, et (2) que l'agent a conclu l'opération de mauvaise foi. La première exigence tient compte de l'état d'esprit de l'agent au moment de l'opération. La corruption dans cette action est constituée par la croyance que la contrepartie de valeur est destinée à influencer l'agent afin qu'il favorise une certaine personne relativement aux affaires de son commettant. L'acceptant se fait alors prendre même s'il a mal interprété l'intention véritable du donneur. L'infraction est consommée sans qu'il soit nécessaire de démontrer que les actes de l'agent ont effectivement été influencés. Le facteur décisif réside dans l'état d'esprit de l'agent qui accepte la contrepartie. Il est facile de satisfaire à la seconde exigence par une preuve de malhonnêteté. La non-divulgation par l'acceptant n'est pas synonyme de l'expression «par corruption» ou de la mauvaise foi, bien qu'elle puisse constituer un indicateur important de la mauvaise foi de l'agent. Dans certaines situations, la divulgation ou l'intention de divulguer sera très pertinente.

En l'espèce, l'accusé devrait être acquitté. Certes, il a vendu la plupart des unités à ses clients; toutefois, il n'a pas vendu parce qu'il a été poussé par la société immobilière à le faire ni parce qu'il croyait que c'était là le but de l'accord avec cette société ou des paiements. L'accord a été conclu sans lien de dépendance, le montant des commissions était identique à celui payé à tout autre vendeur et elles devaient être versées peu importe à qui les unités étaient vendues. La décision de vendre à ses clients a été prise unilatéralement. Son défaut de divulguer de manière complète constitue une inexécu-

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amounted to a breach of his duty but he is not guilty of the offence charged.

tion d'obligation, mais il n'est pas coupable de l'infraction imputée.

Cases Cited

By Cory J.

Distinguished: *Cooper v. Slade* (1858), 6 H.L.C. 746, 10 E.R. 1488; *R. v. Gallagher* (1985), 16 A. Crim. R. 215; **referred to**: *R. v. Morris* (1988), 64 Sask. R. 98; *R. v. Brown* (1956), 116 C.C.C. 287; *R. v. Arnold* (1991), 65 C.C.C. (3d) 171; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

By McLachlin J.

Referred to: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123.

By Sopinka J. (dissenting)

R. v. Brown (1956), 116 C.C.C. 287; *R. v. Morris* (1988), 64 Sask. R. 98; *R. v. Gallagher* (1985), 16 A. Crim. R. 215; *R. v. Gallagher* (1987), 29 A. Crim. R. 33; *R. v. Gross* (1945), 86 C.C.C. 68.

Jurisprudence

Citée par le juge Cory

Distinction d'avec les arrêts: *Cooper c. Slade* (1858), 6 H.L.C. 746, 10 E.R. 1488; *R. c. Gallagher* (1985), 16 A. Crim. R. 215; **arrêts mentionnés**: *R. c. Morris* (1988), 64 Sask. R. 98; *R. c. Brown* (1956), 116 C.C.C. 287; *R. c. Arnold* (1991), 65 C.C.C. (3d) 171; *R. c. Wigglesworth*, [1987] 2 R.C.S. 541.

Citée par le juge McLachlin

Arrêt mentionné: *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123.

Citée par le juge Sopinka (dissident)

R. c. Brown (1956), 116 C.C.C. 287; *R. c. Morris* (1988), 64 Sask. R. 98; *R. c. Gallagher* (1985), 16 A. Crim. R. 215; *R. c. Gallagher* (1987), 29 A. Crim. R. 33; *R. c. Gross* (1945), 86 C.C.C. 68.

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Criminal Code, R.S.C., 1985, c. C-46, s. 426(1)(*a*).

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APPEAL from a judgment of the British Columbia Court of Appeal (1989), 41 B.C.L.R. (2d) 9, 52 C.C.C. (3d) 137, 73 C.R. (3d) 355, dismissing the accused's appeal from his conviction on charges of accepting a secret commission contrary to s. 426(1)(*a*) of the *Criminal Code*. Appeal dismissed, Sopinka J. dissenting.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1989), 41 B.C.L.R. (2d) 9, 52 C.C.C. (3d) 137, 73 C.R. (3d) 355, qui a rejeté l'appel de l'accusé contre sa déclaration de culpabilité relativement à des accusations d'acceptation d'une commission secrète en contravention de l'al. 426(1)*a*) du *Code criminel*. Pourvoi rejeté, le juge Sopinka est dissident.

Stephen Tick, for the appellant.

Patricia J. Donald, for the respondent.

Stephen Tick, pour l'appelant.

Patricia J. Donald, pour l'intimée.

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The judgment of L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. was delivered by

CORY J.—The question raised on this appeal is what the Crown must prove in order to obtain a conviction pursuant to s. 426(1)(*a*) (formerly s. 383(1)(*a*)) of the *Criminal Code*, R.S.C., 1985, c. C-46. Particularly, it must be determined whether the section requires that there be a "corrupt bargain" between the "giver" and "taker" of the reward or benefit.

Factual Background

The appellant William Kelly was one of the principals of Kelly, Peters and Associates Ltd. ("KPA"). This was the central company of a group of companies which offered financial planning services to the general public. KPA and its related companies offered investment counselling to their clients and provided services to implement their planning advice. Clients of KPA were generally successful business people and professionals who earned a good income and required financial advice.

New clients were, as a rule, charged an advisory fee of $2,500 for a personalized "Base Plan". The Plan set out the client's financial situation and made certain basic recommendations regarding the organization of the client's financial affairs. These basic recommendations related to matters such as having a will drawn, purchasing life insurance and investing in registered retirement savings plans.

Clients of KPA paid additional advisory or counselling fees for advice respecting investments in real estate and tax planning strategies. These fees ranged between $2,000 and $30,000 annually depending on the nature of the advice.

Kelly was convicted of charges arising out of his dealings with Qualico Developments Ltd.

Version française du jugement des juges L'Heureux-Dubé, Gonthier, Cory et Iacobucci rendu par

LE JUGE CORY—La question soulevée dans le présent pourvoi est de savoir quels sont les éléments que le ministère public doit prouver pour obtenir une déclaration de culpabilité en vertu de l'al. 426(1)*a*) (anciennement l'al. 383(1)*a*)) du *Code criminel*, L.R.C. (1985), ch. C-46. Il faut notamment déterminer si, en vertu de la disposition, il doit y avoir une «affaire entachée de corruption» entre le «donneur» et l'«acceptant» de la récompense ou du bénéfice.

Les faits

L'appelant William Kelly était l'un des dirigeants de Kelly, Peters and Associates Ltd. («KPA»), la société centrale d'un groupe de sociétés qui offraient au grand public des services de planification financière. KPA et ses sociétés affiliées offraient à leurs clients des conseils en placements ainsi que des services de mise en œuvre des conseils donnés en matière de planification. Dans l'ensemble, les clients de KPA étaient des gens d'affaires et des professionnels prospères, à revenus élevés, qui avaient besoin de conseils financiers.

En principe, on exigeait des nouveaux clients des frais de consultation de 2 500 $ pour l'établissement d'un «plan de base» personnalisé. Ce plan dressait un tableau de la situation financière du client et lui présentait certaines recommandations de base quant à l'organisation de ses affaires financières: préparation d'un testament, achat d'assurance-vie et investissements dans des régimes enregistrés d'épargne-retraite.

Les clients de KPA payaient des frais de consultation additionnels pour obtenir des conseils en placements immobiliers ainsi que des renseignements sur des stratégies de planification fiscale. Ces frais variaient entre 2 000 $ et 30 000 $ par an en fonction de la nature des conseils.

Kelly a été déclaré coupable relativement à des accusations concernant ses opérations avec Qua-

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("Qualico"), a property development company. Each count related to a specific apartment building development marketed by Qualico. Units in these buildings were sold pursuant to the provisions of Canadian tax law respecting Multiple Use Residential Buildings, commonly referred to as MURBs. There is no question that MURBs were often purchased as tax shelters.

Prior to the fall of 1980, KPA had never recommended the purchase of MURBs to its clients. In October of that year, Kelly approached Qualico with regard to a MURB project being built in Vancouver and referred to as Mirror Development. Kelly told the Vancouver branch manager of Qualico that KPA provided financial advice to "good solid" clients who would be interested in investing in the MURBs of the Mirror Development. He persuaded Qualico to give KPA the exclusive right to sell the 112 units of this development.

Qualico had never before dealt with Kelly. As a result KPA was required to post a performance bond of $112,000. The terms of the agreement required KPA to sell all the units within a relatively short time. The agreement was signed on November 7, 1980. By the 24th of November, all the units were sold. KPA received $262,000 for the sale of the units and the performance bond was refunded. The majority of the units were sold to KPA clients, although Kelly, his wife, and some of the associates of KPA bought units as well.

KPA marketed three more Qualico projects in the same manner. It received total commissions from the four projects of $925,586. The fees paid by Qualico to KPA were the same as those which Qualico would have paid to any agent engaged to sell the units.

Evidence at Trial

A cross-section of KPA clients testified. Each one of them had bought units in the Qualico MURBs. They all purchased the MURBs upon the recommendation of Kelly or one of his associates.

lico Development Ltd. («Qualico»), une société immobilière. Chacun des chefs d'accusation portait sur un immeuble d'habitation spécifique mis sur le marché par Qualico. Les unités de ces immeubles étaient vendues conformément aux dispositions du droit fiscal canadien applicables aux immeubles résidentiels à logements multiples, communément appelés IRLM. Il n'y a pas de doute que les IRLM ont souvent été achetés à titre d'abris fiscaux.

Avant l'automne 1980, KPA n'avait jamais recommandé à ses clients d'acheter des IRLM. Cette année-là, en octobre, Kelly a fait des démarches auprès de Qualico relativement à un projet d'IRLM, Mirror Development, en cours de construction à Vancouver. Kelly a dit au gérant du bureau de Vancouver de Qualico que KPA fournissait des conseils financiers à de «solides» clients qui seraient intéressés à investir dans les IRLM de Mirror Development. Il a convaincu Qualico de consentir à KPA le droit exclusif de vente des 112 unités du projet.

Qualico n'avait jamais fait affaire avec Kelly. KPA a donc dû fournir une garantie de bonne exécution de 112 000 $. Aux termes de l'entente, KPA devait vendre toutes les unités dans un délai relativement court. Cette entente a été signée le 7 novembre 1980. Le 24 novembre, toutes les unités étaient vendues. KPA a reçu la somme de 262 000 $ pour la vente des unités ainsi que le remboursement de sa garantie de bonne exécution. La majorité des unités ont été vendues à des clients de KPA, mais Kelly, son épouse et certains des associés de KPA en ont aussi acheté.

KPA a de la même façon mis sur le marché trois autres projets de Qualico. Elle a reçu des commissions totalisant 925 586 $ pour les quatre projets. Qualico a versé à KPA les mêmes frais de commission que ceux qu'elle aurait payés à un agent engagé pour la vente des unités.

La preuve présentée au procès

Un échantillon des clients de KPA ont témoigné. Chacun d'entre eux s'était porté acquéreur d'unités dans les IRLM de Qualico, sur la recommandation de Kelly ou de l'un de ses associés. Les clients ont

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They all testified that they were unaware that Qualico paid KPA a sales commission for each Qualico MURB unit sold to KPA clients.

tous témoigné qu'ils ne savaient pas que KPA recevait de Qualico une commission chaque fois qu'elle vendait à l'un de ses clients une unité d'IRLM.

At their initial meeting with new clients, KPA personnel outlined the history of the firm, the various professional backgrounds of members of the firm, the investment philosophy of the firm, the services the firm could provide, and the various sources of compensation that KPA received either directly, or indirectly through related companies. The presentation took as a rule from one to one and half hours. The explanation of KPA sources of remuneration took less than five minutes. Disclosure of the sources of KPA remuneration was never put in writing to be given to the clients, nor was it raised as a matter of discussion in the initial meeting with the client. Kelly testified that his practice was to write the general sources of KPA remuneration on a "white board" during the first meeting with a new client. Kelly advised associates in his firm that he did not want to put further disclosures with regard to the MURB project in writing.

Au cours de la rencontre initiale avec de nouveaux clients, le personnel de KPA présentait l'historique de l'entreprise, les divers antécédents professionnels de ses membres, la philosophie de l'entreprise en matière de placements, les services offerts ainsi que les diverses sources de la rémunération que KPA recevait directement ou indirectement de sociétés affiliées. En principe, cette présentation durait entre une heure et une heure et demie. L'explication des sources de rémunération de KPA prenait moins de cinq minutes. Ces sources n'ont jamais été mentionnées dans les documents remis aux clients et n'étaient jamais soulevées au cours de la rencontre initiale avec le client. Lorsqu'il rencontrait un client pour la première fois, Kelly a témoigné qu'il avait comme habitude d'inscrire sur «un tableau blanc» les grandes sources de rémunération de KPA. Kelly avait informé les associés de l'entreprise qu'il ne voulait pas donner davantage de précisions écrites relativement au projet d'IRLM.

Kelly, in his evidence, expressed the opinion that clients purchasing the MURBs should have known, from the Offering Memoranda, of the commissions to be paid to KPA. The Offering Memoranda for each of the four projects were lengthy, somewhat complicated booklets. They contained two one-line references to "Issuing and Sales Costs" for the projects. It is not without significance that the accused in cross-examination had great difficulty finding these references in the booklets despite his reliance upon them as providing disclosure of the commissions. The clients of KPA, on the other hand, indicated that they did not read the Offering Memoranda carefully because they relied upon the advice for which they were paying KPA. Significantly, no MURB projects other than Qualico projects were recommended to clients of KPA.

Selon le témoignage de Kelly, la notice d'offre aurait dû permettre aux clients acheteurs d'IRLM de savoir que KPA recevait des commissions. Pour chacun des quatre projets, les notices d'offre étaient des brochures longues et assez compliquées, qui renfermaient deux mentions d'une ligne traitant des [TRADUCTION] «Frais d'émission et de vente». Il importe de signaler que, lors du contre-interrogatoire, l'accusé a lui-même eu beaucoup de difficulté à retrouver ces passages dans les brochures, même s'il se fondait sur celles-ci pour dire qu'il avait divulgué l'existence des commissions. Par contre, les clients de KPA ont indiqué qu'ils n'avaient pas lu attentivement les notices d'offre, se fiant aux conseils que lui fournissait KPA à titre onéreux. Fait révélateur, on n'a jamais recommandé aux clients de KPA d'autres IRLM que ceux de Qualico.

In 1982, the Canadian economy was beset by recession. Those who had invested in real estate could neither find buyers for their property nor

En 1982, l'économie canadienne était en pleine récession. Les investisseurs immobiliers ne pouvaient pas trouver d'acheteurs ni payer leurs créan-

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make payments on their debt load. KPA's clients were thoroughly dissatisfied with their investments and were shocked when they found that the appellant had received substantial commissions for selling the MURBs. The appellant was charged with four counts of corruptly accepting a reward or benefit contrary to s. 383(1)(*a*) (now s. 426(1)(*a*)) of the *Criminal Code*, R.S.C. 1970, c. C-34. He was convicted on all four counts: (1987), 1 W.C.B. (2d) 173. A majority of the Court of Appeal dismissed his appeal from conviction: (1989), 41 B.C.L.R. (2d) 9, 52 C.C.C. (3d) 137, 73 C.R. (3d) 355. He now appeals as of right to this Court based on the dissenting judgment of Hutcheon J.A.

The Judgments Below

Provincial Court of British Columbia

The trial judge found that the timing of the demand from the clients at KPA for MURBs coincided precisely with the two-week period set out in the Qualico agreement for the sale of the units on the Mirror Development. Further, he noted that no other MURBs were recommended to KPA clients until the next Qualico project was ready.

The trial judge then considered the extent of the disclosure of compensation made to the clients with respect to the Qualico transactions. He found that most of KPA's clients were advised verbally that KPA received income from "real estate transactions". With regard to the terms contained in the Offering Memoranda pertaining to "sales costs" and "marketing costs" he observed that, although some experienced clients might have assumed from reading them that commission fees were being paid to KPA for the sale of the MURBs, not one of the clients testified that there was explicit disclosure with regard to the commissions to be received from Qualico.

The trial judge was satisfied that the appellant Kelly was indeed an agent for his clients. Kelly held himself out as a professional financial planner

ciers. Les clients de KPA étaient fort insatisfaits de leurs placements et ont été choqués d'apprendre que l'appelant avait reçu d'importantes commissions relativement à la vente des IRLM. L'appelant a fait l'objet de quatre chefs d'accusation d'avoir, par corruption, accepté une récompense ou un bénéfice en contravention de l'al. 383(1)*a*) (maintenant l'al. 426(1)*a*)) du *Code criminel*, S.R.C. 1970, ch. C-34. Il a été déclaré coupable relativement aux quatre chefs d'accusation: (1987), 1 W.C.B. (2d) 173. La Cour d'appel à la majorité a rejeté l'appel contre la déclaration de culpabilité: (1989), 41 B.C.L.R. (2d) 9, 52 C.C.C. (3d) 137, 73 C.R. (3d) 355. L'appelant se pourvoit maintenant de plein droit devant notre Cour par suite de la dissidence du juge Hutcheon.

Les décisions des tribunaux d'instance inférieure

La Cour provinciale de la Colombie-Britannique

Le juge du procès a conclu que les démarches faites auprès des clients de KPA intéressés à l'achat d'IRLM coïncidaient exactement avec la période de deux semaines, mentionnée dans l'entente conclue avec Qualico pour la vente des unités de Mirror Development. Le juge a aussi noté que KPA n'a recommandé aucun autre achat d'IRLM à ses clients avant l'achèvement du projet suivant de Qualico.

Le juge du procès a ensuite examiné dans quelle mesure il y avait eu divulgation aux clients de la rémunération tirée des opérations avec Qualico. À son avis, la plupart des clients avaient été informés oralement que KPA recevait des revenus d'«opérations immobilières». En ce qui concerne la mention dans les notices d'offre de [TRADUCTION] «frais de vente» et de «frais de commercialisation», il a fait remarquer que certains clients expérimentés auraient pu, à la lecture des notices, conclure au versement de commissions à KPA pour la vente des IRLM; toutefois, aucun des clients n'a témoigné qu'il y avait eu divulgation explicite des commissions reçues de Qualico.

Le juge du procès était convaincu que l'appelant Kelly était en fait l'agent de ses clients. Kelly se représentait comme un conseiller en planification

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with special skills. He gave advice on significant and confidential matters. He specifically set out to establish a long-term fiduciary relationship with his clients. He was both an advisor and the implementor of the advice for his clients who were, in that regard, his principals.

The trial judge emphasized that the appellant conducted himself "in a manner that was calculated to result in enjoying his clients' fullest confidence and trust". He also observed that "the Accused went a long way out of his way to deliberately close his clients' eyes to the possibility of corruption". It was his opinion that the appellant did not disclose the Qualico commissions to his clients. The essence of the judgment is set out in these words:

> ... he had an obligation to make *full, frank and fair disclosure* of the Qualico fees. At best on the evidence he deliberately made disclosure of those fees a *remote possibility* and not even a probability. In failing to make *adequate* disclosure, I find that the Accused acted dishonestly, unfaithfully, without integrity and therefore corruptly in accepting the Qualico fees.
>
> If his clients had been provided full, frank and fair disclosure some of them probably would not have acted any differently. But some of them might have been in a better position to negotiate down the amount of advisory fees they were paying. Some of them might have questioned both the quality and quantity of M.U.R.B.s they were told to buy. Some of them might have invested in other M.U.R.B.s, the purchase of which would not have resulted in commissions being paid to the Accused.
>
> By contracting secretly with Qualico, the Accused knowingly fettered what he held out to be his professional judgment and put himself in a criminal conflict of interest. [Emphasis in original.]

The trial judge therefore found the appellant guilty as charged on all four counts of the indictment.

financière possédant des compétences spéciales. Il conseillait ses clients relativement à des questions importantes et confidentielles. Il entendait spécifiquement établir un rapport fiduciaire à long terme avec ses clients. Il était conseiller et s'occupait aussi de la mise en œuvre des conseils fournis à ses clients, qui se trouvaient alors, à cet égard, ses commettants.

Le juge du procès a fait ressortir que l'appelant s'est conduit [TRADUCTION] «d'une manière visant délibérément à bénéficier de la pleine confiance de ses clients». Le juge a aussi précisé que [TRADUCTION] «l'accusé s'est donné beaucoup de mal pour dissimuler délibérément à ses clients la possibilité de corruption». À son avis, l'appelant n'a pas divulgué à ses clients l'existence des commissions. Voici les points essentiels du jugement:

> [TRADUCTION] ... il avait l'obligation de *divulguer d'une manière complète, franche et impartiale* les commissions que lui versait Qualico. D'après les éléments de preuve, il a tout au mieux délibérément tenté de faire de l'existence de ces commissions une *possibilité lointaine*, même pas une probabilité. En omettant de faire une divulgation *appropriée*, l'accusé a, à mon avis, agi d'une façon malhonnête, déloyale, sans intégrité, et donc par corruption, en acceptant les commissions de Qualico.
>
> S'il avait divulgué d'une manière complète, franche et impartiale l'existence des commissions à ses clients, certains n'auraient peut-être pas agi autrement. Toutefois, certains auraient peut-être été mieux placés pour négocier une réduction des frais de consultation qu'ils payaient. Certains auraient peut-être mis en doute la qualité et le nombre d'IRLM qu'on leur disait d'acheter. Certains auraient peut-être acheté d'autres IRLM, dont l'achat n'aurait peut-être pas entraîné le versement de commissions à l'accusé.
>
> En négociant secrètement un contrat avec Qualico, l'accusé a sciemment entravé l'exercice de son jugement professionnel et s'est placé dans une situation de conflit d'intérêts criminel. [En italique dans l'original.]

En conséquence, le juge du procès a déclaré l'appelant coupable relativement aux quatre chefs d'accusation.

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Court of Appeal (1989), 52 C.C.C. (3d) 137

Locke J.A., writing for the majority, quoted from the reasons of the Saskatchewan Court of Appeal, in *R. v. Morris* (1988), 64 Sask. R. 98, at p. 118, where that court found that the provisions of s. 383 (now s. 426) are directed toward the preservation of the integrity of employees and agents of a principal and those who deal with them. To that end society has decreed that secret commissions are not acceptable as they compromise the integrity of our commercial life. The essence of this offence involves the taking of a "secret commission". However, if the agent takes a commission with the full knowledge and consent of his principal then no offence is made out.

In the opinion of Locke J.A. the section is designed to prevent agents from being put in a position of temptation. He cited *R. v. Brown* (1956), 116 C.C.C. 287, at p. 289, for the proposition that "the act of doing the very thing which the statute forbids is a corrupt act within the meaning of the word 'corruptly' used in the section under consideration" (p. 154).

He also determined that this section does not require a "corrupt bargain". He put his position in this way (at p. 155):

> ... the statute requires a *transaction*, but that transaction need be no more than the giver paying the taker to do something in relation to his client's affairs, and the taker knowing this. Such a transaction can be completely blameless in so far as the giver is concerned, and in the ordinary course of business. But the crime is committed by the taker who receives the money knowing the reason it is paid. That, in my view, is this case.
>
> . . .
>
> As I have said, in my opinion the "corruption" can be one-sided only. The precise words of the section do not literally require that the other party to the transaction also be guilty of an offence. [Emphasis in original.]

He was of the view that the acceptance by Kelly of the commission from Qualico was "corrupt"

La Cour d'appel (1989), 52 C.C.C. (3d) 137

Le juge Locke, s'exprimant au nom de la majorité, a cité les motifs de la Cour d'appel de la Saskatchewan dans l'arrêt *R. c. Morris* (1988), 64 Sask. R. 98, à la p. 118; dans cette affaire, la cour a conclu que les dispositions de l'art. 383 (maintenant l'art. 426) visent à préserver l'intégrité des employés et des agents d'un commettant et de ceux qui font affaire avec eux. C'est pourquoi la société a déclaré inacceptables les commissions secrètes puisqu'elles mettent en péril l'intégrité de l'activité commerciale. L'infraction créée vise essentiellement l'acceptation d'une «commission secrète». Toutefois, si l'agent accepte une commission au su et avec le consentement de son commettant, il ne commet pas d'infraction.

De l'avis du juge Locke, de par sa conception, l'article vise à ne pas placer l'agent dans une situation de tentation. Il cite l'arrêt *R. c. Brown* (1956), 116 C.C.C. 287, à la p. 289, qui dit que [TRADUCTION] «faire la chose même que la loi interdit est un acte entaché de corruption au sens donné à l'expression «par corruption» dans l'article en question» (p. 154).

Il a aussi conclu que l'article n'exige pas l'existence d'une «affaire entachée de corruption» (à la p. 155):

> [TRADUCTION] ... la loi prévoit l'existence d'une *opération*, mais il suffit que le donneur paie l'acceptant pour accomplir quelque chose relativement aux affaires de son client et que l'acceptant le sache. Cette opération peut être complètement inoffensive du point de vue du donneur, et être dans le cours normal des affaires. Toutefois, l'acceptant commet un acte criminel s'il connaît la raison pour laquelle l'argent est versé. Selon moi, c'est le cas en l'espèce.
>
> . . .
>
> Comme je l'ai mentionné, à mon avis, l'expression «par corruption» peut viser une partie seulement. Le libellé même de l'article n'exige pas littéralement que l'autre partie à l'opération soit également coupable d'une infraction. [En italique dans l'original.]

De l'avis du juge Locke, l'acceptation par Kelly de la commission versée par Qualico était un acte

unless sufficient disclosure was made to the clients of KPA.

entaché de «corruption», sauf s'il y avait eu divulgation suffisante de l'existence de cette commission aux clients de KPA.

He said "it cannot be successfully contended that there is no basis for the trial judge's finding that there had not been sufficient disclosure of the Qualico commissions" (p. 159). In his view, "[t]he disclosure must be adequate and full in the sense that the principal must be specifically advised, or it be otherwise made so crystal clear that he could not deny he ought to have known. That was not done in this case" (p. 160). As a result the majority dismissed the appeal.

Selon lui, [TRADUCTION] «on ne peut prétendre avec succès que le juge du procès n'était pas fondé à conclure qu'il n'y avait pas eu divulgation suffisante de l'existence des commissions versées par Qualico» (p. 159). Il ajoute que [TRADUCTION] «[l]a divulgation doit être appropriée et complète en ce sens que le commettant doit être expressément informé de l'existence des commissions ou elle doit être tellement limpide que le commettant ne pourrait nier qu'il aurait dû être au courant. Cela n'a pas été fait en l'espèce» (p. 160). En conséquence, la Cour d'appel à la majorité a rejeté l'appel.

Hutcheon J.A. dissenting found that this section required proof of a "corrupt bargain" between the agent and the third party. He concluded that this section had no application in the absence of a corrupt bargain between the taker and the giver. He then applied his conclusion to the facts of this case in these words (at p. 146):

Le juge Hutcheon, dissident, a conclu que l'alinéa en question exigeait la preuve de l'existence d'une «affaire entachée de corruption» entre l'agent et la tierce partie. À son avis, l'alinéa n'est pas applicable en l'absence d'une affaire entachée de corruption entre le donneur et l'acceptant de la commission. Il a alors appliqué sa conclusion aux faits de l'espèce, à la p. 146:

> ... Qualico was not a party to a corrupt bargain. The commissions were paid at the ordinary rate and in the ordinary course of business. Qualico knew nothing of the relations between Kelly/Peters and its clients. As I view s. 383, in every case of a completed offence, there must be a giver of the benefit "in consideration of ... " and a taker of the benefit "in consideration of ...". Qualico did not "*give*" anything; it *paid* the ordinary commission paid other agents. In these circumstances s. 383 of the *Criminal Code* has no application. [Emphasis in original.]

> [TRADUCTION] ... Qualico n'était pas partie à une affaire entachée de corruption. Les commissions étaient payées au taux habituel et dans le cours normal des affaires. Qualico n'était pas au courant des relations entre Kelly/Peters et ses clients. Selon mon interprétation de l'art. 383, dans chaque cas d'une infraction consommée, il doit y avoir une personne qui donne un bénéfice «à titre de contrepartie ...» et une personne qui accepte ce bénéfice «à titre de contrepartie ...». Qualico n'a pas «*donné*» quoi que ce soit; elle a *payé* la commission habituelle versée aux autres agents. Dans ces circonstances, l'art. 383 du *Code criminel* n'est pas applicable. [En italique dans l'original.]

Hutcheon J.A. would have allowed the appeal and set aside the convictions.

Le juge Hutcheon aurait accueilli l'appel et annulé les déclarations de culpabilité.

The Issue

La question en litige

The issue on appeal is relatively narrow. It must be based upon the question of law on which Hutcheon J.A. dissented from the majority. The formal order of the Court of Appeal was carefully drawn and settled by that court. The portion per-

La question en litige est relativement restreinte. Elle doit se fonder sur la question de droit soulevée par le juge Hutcheon dans sa dissidence. La Cour d'appel a soigneusement rédigé son ordonnance formelle pour trancher le litige. Voici la partie

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taining to the dissenting reasons of Hutcheon J.A. is as follows:

AND BE IT FURTHER RECORDED THAT The Honourable Mr. Justice Hutcheon dissented and would have dismissed the appeal, and his dissent was grounded in whole upon the following questions of law:

1. The essence of the case for the Crown was that the commissions were accepted by Kelly/Peters secretly and contrary to Section 383(1)(a) of the Criminal Code. The main issue on this appeal is whether s. 383 has any application where the person making the payments was not part of a corrupt bargain with Kelly. My conclusion is that s. 383 (now s. 426(1)(a)) has no application in such circumstances and the conviction must be quashed.

Thus, it is apparent that the dissenting reasons give rise to only one question of law. Namely, it must be determined whether s. 383 (now s. 426) has any application where the party making the payments, Qualico, was not part of a corrupt bargain with the taker, Kelly. In answering the "corrupt bargain" question, it is necessary to examine this issue in the context of the elements of the offence and the meaning of "corruptly".

The Relevant Statutory Provision

Section 426(1) of the *Criminal Code* provides:

426. (1) Every one commits an offence who

(*a*) corruptly

(i) gives, offers or agrees to give or offer to an agent, or

(ii) being an agent, demands, accepts or offers or agrees to accept from any person,

any reward, advantage or benefit of any kind as consideration for doing or forbearing to do, or for having done or forborne to do, any act relating to the affairs or business of his principal or for showing or forbearing to show favour or disfavour to any person with relation to the affairs or business of his principal;

ayant trait aux motifs de dissidence du juge Hutcheon:

[TRADUCTION] QU'IL SOIT EN OUTRE PRIS ACTE DU FAIT QUE le juge Hutcheon est dissident et aurait rejeté l'appel et que sa dissidence se fonde entièrement sur les questions de droit suivantes:

1. Le ministère public devait essentiellement prouver que les commissions avaient été acceptées secrètement par Kelly/Peters et en contravention de l'al. 383(1)a) du Code criminel. En appel, la principale question est de savoir si l'art. 383 est applicable si l'auteur des paiements n'a pas conclu avec Kelly une affaire entachée de corruption. À mon avis, l'art. 383 (maintenant l'al. 426(1)a)) n'est pas applicable dans ces circonstances et la déclaration de culpabilité doit être annulée.

Il est donc évident que les motifs de dissidence soulèvent une seule question de droit. Il s'agit de déterminer si l'art. 383 (maintenant l'art. 426) est applicable dans le cas où l'auteur des paiements, en l'occurrence Qualico, n'a pas conclu une affaire entachée de corruption avec l'acceptant, Kelly. Pour répondre à cette question, il faut l'examiner dans le contexte des éléments de l'infraction et de l'interprétation donnée à l'expression «par corruption».

La disposition législative pertinente

Voici le texte du par. 426(1) du *Code criminel*:

426. (1) Commet une infraction quiconque, selon le cas:

a) par corruption:

(i) donne ou offre, ou convient de donner ou d'offrir, à un agent,

(ii) étant un agent, exige ou accepte ou offre ou convient d'accepter, de qui que ce soit,

une récompense, un avantage ou un bénéfice de quelque sorte à titre de contrepartie pour faire ou s'abstenir de faire, ou pour avoir fait ou s'être abstenu de faire, un acte relatif aux affaires ou à l'entreprise de son commettant ou pour témoigner ou s'abstenir de témoigner de la faveur ou de la défaveur à une personne quant aux affaires ou à l'entreprise de son commettant;

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The Importance of the Agency Relationship

Before considering the purpose of s. 426, something must be said of the importance of the agency relationship in today's society. Society today simply could not function without the services of agents. The number of the principal/agent relationships is legion. It is difficult to sell a house or commercial property without relying upon a real estate agent. It is difficult to place insurance of any kind without consulting an insurance agent. Holidays are arranged through a travel agent. Brokers act as agents in the most complex and difficult financial transactions. Solicitors act as agents for their clients.

With increasing frequency financial advisors are acting as agents for their clients. Very often business and professional people earning a good income are too busy earning that income to properly arrange their financial affairs. They turn to financial advisors for assistance. The principal/agent relationship is almost invariably based upon the disclosure by the principal to the agent of confidential information. The relationship is founded upon the trust and confidence that the principal can repose in the advice given and the services performed by the agent.

The Nature of Agency

In *The Law of Agency* (5th ed. 1983), Fridman suggests at p. 9 the following definition of agency:

Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property. [Emphasis in original.]

The principal must be able to place trust and confidence in the agent since the agent has the authority to affect the legal position of the principal. This is perhaps the focus of the relationship. In essence the agent acts to achieve the same results that would have been obtained if the principal had acted on his or her own account. The influence the

L'importance du mandat

Avant d'examiner l'objet de l'art. 426, je tiens à faire ressortir l'importance du mandat dans la société contemporaine. Celle-ci ne pourrait tout simplement pas fonctionner en l'absence de mandataires ou d'agents. Il existe une multitude de rapports commettant-agent. Mentionnons notamment qu'il est difficile de vendre une maison ou un immeuble commercial sans un agent immobilier ou encore de s'assurer sans consulter un agent d'assurance. Les agents de voyages organisent les vacances, et les courtiers agissent à titre d'agents dans le cadre d'opérations financières fort complexes et difficiles. Les avocats agissent également à titre d'agents pour le compte de leurs clients.

De plus en plus, les conseillers financiers agissent à titre d'agents pour leurs clients. Très souvent, les gens d'affaires et les professionnels qui ont un revenu élevé sont trop accaparés par leur travail pour bien organiser leurs affaires financières. Ils font alors appel aux services de conseillers financiers. Le rapport commettant-agent est presque toujours fondé sur la divulgation de renseignements confidentiels par le commettant à l'agent. Ce rapport repose sur la confiance que le commettant peut avoir dans les conseils et les services que l'agent lui fournit.

La nature du mandat

Dans *The Law of Agency* (5e éd. 1983), Fridman propose, à la p. 9, la définition suivante du mandat:

[TRADUCTION] Le mandat est le rapport qui existe entre deux personnes dont l'une, l'*agent*, est en droit considérée comme la représentante de l'autre, le *commettant*, si bien que cet agent peut, par la conclusion de contrats ou l'aliénation de biens, influer sur la situation juridique du commettant à l'égard de tierces parties. [En italique dans l'original.]

Le commettant doit pouvoir faire confiance à l'agent car ce dernier peut influer sur sa situation juridique. C'est peut-être là l'élément central du rapport. Essentiellement, l'agent vise à atteindre les mêmes résultats que ceux qu'aurait atteints le commettant s'il avait agi pour son compte. L'agent peut exercer une si grande influence sur les affaires

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agent can have on the affairs of the principal and the power to take action on behalf of the principal are significant. They are of such great significance that it follows as the night the day that the agent must always act in the best interests of the principal.

The Duties of an Agent

The agent is obliged to perform those duties which he or she has undertaken to perform. The primary consideration in performing the duties of the agent must be to always act in the best interests of the principal. However, in performing them the agent must not exceed the authority which was delegated by the principal.

In the context of the "Secret Commission" cases, the fundamental duties of the agent are those arising from the fiduciary nature of the agency relationship. The relationship of trust focuses on the principal with the result that agents must not let their own personal interests conflict with the obligations owing to their principals. A conflict of interest exists when an agent is faced with a choice between the agent's personal interest and the agent's duty to the principal. Fridman, *supra*, put it in this way (at p. 153):

> Where the agent is in a position in which his own interest may affect the performance of his duty to the principal, the agent is obliged to make a full disclosure of all the material circumstances, so that the principal, with such full knowledge, can choose whether to consent to the agent's acting.

The policy of the courts has been stringent in seeking to prohibit not just actual fraud perpetrated by agents on their principals but also in prohibiting the creation of a situation where agents could be tempted into fraud. The text, *Bowstead on Agency* (14th ed. 1976), provides several examples where the agent has a personal interest and, therefore, must make full disclosure (at p. 130):

> . . . an agent may not buy his principal's property or sell his property to his principal because in such a case his interest will be in conflict with his duty. He is not

du commettant et il possède un si grand pouvoir d'agir pour le compte de ce dernier qu'il doit, cela va de soi, agir en tout temps au mieux des intérêts du commettant.

Les fonctions d'un agent

L'agent doit exécuter les fonctions qu'il s'est engagé à remplir. Dans l'exercice de ses fonctions, l'agent doit avant tout agir au mieux des intérêts du commettant. Toutefois, pour y arriver, l'agent ne doit pas excéder le mandat que lui a confié le commettant.

Dans le contexte des affaires de «commissions secrètes», les fonctions essentielles de l'agent découlent de la nature fiduciaire du mandat. Le rapport de confiance est axé sur le commettant, et l'agent ne doit pas laisser ses intérêts personnels entrer en conflit avec ses obligations envers celui-ci. Il y a conflit d'intérêts quand l'agent doit choisir entre son intérêt personnel et son obligation envers le commettant. Selon Fridman, *op. cit.*, à la p. 153:

> [TRADUCTION] Si l'agent se trouve dans une situation où son intérêt personnel peut influer sur l'exécution de son obligation envers le commettant, il est tenu de faire une divulgation complète de toutes les circonstances pertinentes, pour que le commettant puisse, en pleine connaissance, décider s'il consent à l'acte de l'agent.

Les tribunaux ont adopté une ligne de conduite stricte, cherchant non seulement à interdire les véritables actes frauduleux commis par un agent à l'endroit de son commettant, mais aussi à empêcher que les agents ne se trouvent pas dans une situation qui invite à la corruption. On trouve dans *Bowstead on Agency* (14e éd. 1976) plusieurs exemples où l'agent a un intérêt personnel et doit, par conséquent, faire une divulgation complète (à la p. 130):

> [TRADUCTION] . . . un agent ne peut acheter le bien de son commettant ni vendre son bien à ce dernier parce que dans un tel cas il y aurait conflit entre son intérêt et

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allowed to receive a commission from both parties to a transaction; he may not make any secret profits by exploiting his position or the property of his principal; he may not acquire a benefit for himself by dealing with a third party in breach of his relationship with his principal, nor may he compete with his principal.

son obligation. L'agent ne peut recevoir une commission des deux parties à une opération; il ne peut réaliser de profits secrets en exploitant sa situation ou le bien de son commettant; il ne peut retirer un bénéfice pour lui-même de rapports avec une tierce partie qui sont en contravention de ses rapports avec son principal et il ne peut faire concurrence à son commettant.

The agency relationship is extremely important to the functioning of our society. It is a relationship based on trust and it is fiduciary in nature. It is essential that the integrity of that relationship be preserved.

Le mandat est extrêmement important pour le fonctionnement de notre société. Ce rapport est fondé sur la confiance et il est de nature fiduciaire. Il est essentiel d'en préserver l'intégrité.

The Purpose of Section 426

L'objet de l'art. 426

There can be no doubt that s. 426 acknowledges both the importance of the agency relationship and the necessity of preserving the integrity of that relationship. It confirms that an agent should not be placed in a position which is in conflict with that of the principal. It recognizes that a benefit taken by an agent from a third party will place that agent in a conflict of interest position with the principal unless the benefit is promptly and adequately disclosed. No one should provide an agent with a benefit, knowing the benefit to be secret, in order to influence the agent with regard to the affairs of the principal. To do so corrupts and destroys the agency relationship. The secret benefit renders the advice and services of an agent so suspect that they cannot be accepted.

Il n'y a pas de doute que l'art. 426 reconnaît à la fois l'importance du mandat et la nécessité de préserver l'intégrité du rapport qu'il implique. Cet article vient confirmer qu'un agent ne devrait pas être placé dans une situation qui entre en conflit avec celle du commettant. Par exemple, le bénéfice qu'un agent accepte d'une tierce partie le placera dans une situation de conflit d'intérêts à l'égard de son commettant, sauf si l'existence de ce bénéfice est divulgué avec diligence et d'une façon appropriée. Il est interdit à quiconque d'offrir à un agent un bénéfice, que l'on sait secret, afin de l'influencer quant aux affaires de son commettant. Une telle action vient corrompre et détruire le rapport découlant d'un mandat. Le versement d'un bénéfice secret rend les conseils et les services fournis par l'agent tellement suspects qu'ils ne peuvent être acceptés.

The position was correctly stated in *R. v. Morris*, *supra*, where at pp. 112 and 116 the following appears:

Cette situation a été bien énoncée dans l'arrêt *R. c. Morris*, précité, aux pp. 112 et 116:

> The intent of the section is that no one shall make secret use of an agent's position and services by means of giving him any kind of consideration for it. . . . [T]he intent in passing this section was and is to protect the principal, the employer, in the conduct of his affairs and business against people who might make use or attempt to make use of his agent.
>
> . . .

> [TRADUCTION] L'article vise à interdire à quiconque de profiter secrètement de la situation et des services d'un agent en lui versant une contrepartie quelconque. [. . .] [C]omme au moment de son adoption, l'article continue de viser à protéger le commettant, l'employeur, dans la conduite de ses affaires et de son entreprise, contre les personnes qui pourraient utiliser ou tenter d'utiliser son agent.
>
> . . .

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The legislative history of this section demonstrates that the purpose and intent of it is to criminalize an agent's or employee's act of accepting "secret commissions" for showing favour or disfavour to any person with relation to the affairs or business of his principal.

L'historique législatif de cet article démontre que son objet et son intention sont de criminaliser l'acceptation par un agent ou un employé de «commissions secrètes» pour témoigner de la faveur ou de la défaveur quant aux affaires ou à l'entreprise de son commettant.

There can be no doubt that the commendable aim of s. 426 is to protect the agency relationship, to preserve its integrity and to protect the principal.

Il ne peut y avoir de doute que l'objet louable de l'art. 426 est de protéger le rapport découlant d'un mandat, d'en préserver l'intégrité et de protéger le commettant.

Is Section 426 Applicable to the Facts of this Case?

L'article 426 est-il applicable aux faits de l'espèce?

(a) *Agency Relationship — The First Element*

a) *Le mandat — Le premier élément*

First the Crown must establish that Kelly was acting, and knew he was acting, as an agent for the clients of his company KPA. There can be no doubt in this case that an agency relationship existed between Kelly and his clients and that Kelly was aware of the existence of that relationship. Indeed this element of the offence was not an issue on this appeal or at the trial.

Le ministère public doit tout d'abord établir que Kelly agissait et savait qu'il agissait à titre d'agent pour le compte des clients de sa société, KPA. En l'espèce, il n'y a pas de doute qu'il y avait un mandat entre Kelly et ses clients et que Kelly était au courant de l'existence de ce mandat. En fait, cet élément de l'infraction n'a été soulevé ni en appel ni en première instance.

(b) *Accepting a Benefit to Influence One's Principal — The Second Element*

b) *L'acceptation d'un bénéfice pour influencer les affaires du commettant — Le deuxième élément*

The second element the Crown must prove is that the agent took the benefit as consideration for acting in relation to the affairs of the agent's principal. There can be no doubt that Kelly accepted a commission from a third party. It goes without saying that this commission comes within the category of a "reward, advantage or benefit" required by s. 426. Nor can there be any question that the commissions were accepted as consideration for doing an act in relation to the affairs of the principals. Clearly, Kelly accepted the payment for recommending and eventually selling the MURBs to his clients.

Le ministère public doit en deuxième lieu prouver que l'agent a accepté un bénéfice à titre de contrepartie pour agir dans le cadre des affaires de son commettant. Il n'y a pas de doute que Kelly a accepté une commission d'une tierce partie. Il va sans dire que cette commission est comprise dans la catégorie «une récompense, un avantage ou un bénéfice», prévue à l'art. 426. Il est également évident que Kelly a accepté les commissions à titre de contrepartie pour faire un acte relatif aux affaires des commettants. Il est clair que Kelly a accepté le paiement pour recommander et ultérieurement vendre à ses clients les IRLM.

To establish the requisite *mens rea* for this second element, the Crown must prove that the taker, knowingly accepted the commission as consideration for acting in relation to the affairs of his clients or principals. It must be remembered that offences involving "secret commissions" are by their very nature secretive. They arise from operations that are inherently covert. It follows that

Pour établir la *mens rea* requise relativement à ce deuxième élément, le ministère public doit prouver que l'acceptant a sciemment accepté la commission à titre de contrepartie pour agir dans le cadre des affaires de ses clients ou de ses commettants. Il faut se rappeler que les infractions portant sur les «commissions secrètes» sont, de par leur nature même, secrètes. Elles découlent d'opéra-

courts should in these cases apply common sense and draw the reasonable and appropriate inferences from the proven facts.

tions qui sont intrinsèquement clandestines. Il s'ensuit que les tribunaux doivent faire preuve de bon sens et tirer les déductions raisonnables et appropriées des faits.

Certainly Qualico's purpose in paying commissions to Kelly would be to encourage Kelly to influence his clients to purchase Qualico MURBs. Here it was Kelly who sought out Qualico to negotiate an agreement for selling MURBs and for receiving commissions on those sales. It was Kelly who advised the resident manager of Qualico that he had "good solid" clients to whom he could sell the MURBs. On the first development, Kelly was prepared to incur the risks of a performance bond with a strict time limit as part of the agreement for selling the entire development. The only time that Kelly advised any of his clients to purchase MURBs was when the Qualico developments were put on the market. Thus, it is clear from the inherent nature of commissions and from Kelly's actions that Kelly knowingly accepted the Qualico payments as consideration for influencing his principals (that is to say his clients) to purchase MURBs. He was eminently successful in doing just that.

L'intention de Qualico, en payant les commissions, était certes d'encourager Kelly à inciter ses clients à se porter acquéreurs des IRLM de Qualico. En l'espèce, c'est Kelly qui a demandé à Qualico de négocier une entente concernant la vente des IRLM et la réception des commissions de vente applicables. C'est Kelly qui a informé le gérant local de Qualico qu'il avait des clients «solides» à qui il pourrait vendre les IRLM. Dans le cadre de l'entente visant la vente de toutes les unités comprises dans le premier projet, Kelly était disposé à assumer les risques liés à une garantie de bonne exécution, assortie d'un délai rigoureux. Ce n'est que pendant que les unités de Qualico étaient sur le marché que Kelly recommandait à ses clients d'acheter des IRLM. En conséquence, il ressort clairement de la nature inhérente des commissions et des actes de Kelly que celui-ci acceptait sciemment les paiements de Qualico à titre de contrepartie pour inciter ses commettants (en l'occurrence ses clients) à se porter acquéreurs d'IRLM. Il a fort bien réussi sur ce plan.

(c) *Non-Disclosure and the Meaning to be Attributed to "Corruptly" — The Third Element*

c) *La non-divulgation et l'interprétation de l'expression «par corruption» — Le troisième élément*

(i) Meaning of "Corruptly" in Section 426

(i) Interprétation de l'expression «par corruption» à l'art. 426

It will be remembered that s. 426 covers everyone who corruptly

1. gives, offers or agrees to give or offer to an agent, or
2. being an agent, demands, accepts or offers or agrees to accept from any person, any reward, etc.

On se souviendra que l'art. 426 vise quiconque, selon le cas, par corruption:

1. donne ou offre, ou convient de donner ou d'offrir, à un agent,
2. étant un agent, exige ou accepte ou offre ou convient d'accepter, de qui que ce soit, une récompense, etc.

What meaning should be given to the word "corruptly" in the context of this section? It is argued that the offence is complete as soon as the agent takes the benefit as consideration for influencing the affairs of the principal. This is based

Quelle interprétation doit-on donner à l'expression «par corruption» dans cet article? On soutient que la perpétration de l'infraction est complète dès que l'agent accepte le bénéfice à titre de contrepartie pour influencer les affaires du commettant.

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upon decisions such as *Cooper v. Slade* (1858), 6 H.L.C. 746, 10 E.R. 1488, and *R. v. Gallagher* (1985), 16 A. Crim. R. 215 (Vict. C.C.A.). I cannot accept this position. It stems from the old jurisprudence on the corruption of voters. It is true these cases together with those which deal with the bribery of officials are concerned with the interpretation of "corruption". However, they are readily distinguishable from the secret commissions cases. In bribery cases there is no prerequisite that an agency relationship exists. Yet the whole aim and object of s. 426 is the protection of the vulnerable principal and the preservation of the integrity of the agent/principal relationship. Furthermore, the nature of a commission is very different from that of a bribe.

The interpretation of the word "corruptly" must take place within the context of s. 426 itself. It is a trite rule of statutory interpretation that every word in the statute must be given a meaning. It would be superfluous to include "corruptly" in the section if the offence were complete upon the taking of the benefit in the circumstances described by the section. The word must add something to the offence.

In my view, corruptly, as used in the section, designates secrecy as the corrupting element of the offence. It is the failure to disclose that makes it impossible for the principal to determine whether to act upon the advice of the agent or accept the actions of the agent. It is the non-disclosure which makes the receipt of the commission or reward corrupt. The word corruptly, in this context, adds the element of non-disclosure to the *actus reus* of the offence.

The recognition of secrecy as the corrupting element of s. 426 is consistent with the analysis in *R. v. Brown*, *supra*. There Laidlaw J.A. discussed the meaning of "corruptly" in the context of s. 368 (now s. 426). He found that the "evil against which that provision in the Criminal Code is directed is secret transactions or dealings with a person in the

Cette thèse se fonde notamment sur les arrêts *Cooper c. Slade* (1858), 6 H.L.C. 746, 10 E.R. 1488, et *R. c. Gallagher* (1985), 16 A. Crim. R. 215 (C.C.A. Vict.). Je ne peux accepter cette prétention car elle se fonde sur une jurisprudence ancienne sur la corruption des électeurs. Il est exact que ces arrêts et ceux qui ont trait à la corruption de fonctionnaires portent sur l'interprétation du terme «corruption». Toutefois, ils se distinguent facilement des affaires de commissions secrètes. Dans les cas de corruption de fonctionnaires, l'existence d'un mandat n'est pas nécessaire. Cependant, l'art. 426 est entièrement axé sur la protection du commettant vulnérable et la préservation de l'intégrité du rapport agent-commettant. De plus, la nature d'une commission est fort différente de celle d'un pot-de-vin.

L'expression «par corruption» doit être interprétée dans le contexte de l'art. 426. Il est bien établi dans le domaine de l'interprétation législative qu'il faut conférer un sens à chaque terme d'une loi. Il serait superflu d'inclure l'expression «par corruption» dans l'article si la perpétration de l'infraction était complète dès l'acceptation du bénéfice dans les circonstances décrites dans l'article. L'expression «par corruption» doit donc ajouter quelque chose à l'infraction.

À mon avis, l'expression «par corruption», au sens où elle est utilisée dans cet article, implique le secret. C'est en raison de la non-divulgation de l'existence de la commission qu'il est impossible pour le commettant de déterminer s'il doit suivre les conseils de l'agent ou admettre les actes accomplis par ce dernier. C'est la non-divulgation qui rend la réception de la commission ou de la récompense entachée de corruption. Dans ce contexte, l'expression «par corruption» ajoute l'élément de non-divulgation à l'*actus reus* de l'infraction.

En reconnaissant que l'expression «par corruption» visée à l'art. 426 implique le secret, on adopte une interprétation compatible avec l'analyse contenue dans l'arrêt *R. c. Brown*, précité. Dans cette affaire, le juge Laidlaw de la Cour d'appel a analysé le sens de l'expression «par corruption» dans le contexte de l'art. 368 (maintenant

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position of agent concerning the affairs or business of the agent's principal" (p. 289). (Emphasis added.)

The interpretation of corruptly as secretly or without disclosure reinforces the aim of s. 426 to preserve the integrity of the agent/principal relationship. It is as well supported by the heading "Secret Commission" which precedes this section. It is the secrecy of the benefit and not the benefit itself which constitutes the essence of the offence. The appellant Kelly argued that the words in the heading are merely marginal notes, and as such should not be considered when interpreting the words in the section. I cannot agree with that contention. *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, makes it clear that it is appropriate to consider the statutory heading and the history of a section as an aid in interpreting the aim of a section.

In sum, corruptly, in the context of secret commissions, means without disclosure. This definition provides some symmetry between the two offences created by s. 426(1)(*a*). Corruptly, with respect to the taker/agent, refers to the agent's failure to disclose the payment to the principal in an adequate and timely manner. With respect to the giver, corruptly means the reward was given with the expectation and intention that the agent would not disclose it to the principal in an adequate and timely manner.

(ii) What is the Appropriate Standard for Disclosure?

What then is the extent of disclosure that is required of an agent? To put it in another way, what degree of non-disclosure is the Crown required to prove in order to establish the guilt of an agent under s. 426? The majority of the British Columbia Court of Appeal in *Kelly* held that the

l'art. 426): [TRADUCTION] «Le problème auquel veut remédier cette disposition du Code criminel est celui des opérations secrètes conclues avec une personne dans la situation d'un agent relativement aux affaires ou à l'entreprise de son commettant» (p. 289). (Je souligne.)

En conférant à l'expression «par corruption» le sens de «secrètement» ou de «non-divulgation», on renforce l'objet de l'art. 426, qui est de préserver l'intégrité du rapport agent-commettant. Cette interprétation est également appuyée par la rubrique introductive intitulée «Commissions secrètes». C'est le caractère secret du bénéfice et non le bénéfice en soi qui constitue l'élément essentiel de l'infraction. L'appelant Kelly soutient que les termes de cette rubrique sont de simples notes marginales dont on ne doit pas tenir compte dans l'interprétation de l'article. Je ne puis souscrire à cette opinion. L'arrêt *R. c. Wigglesworth*, [1987] 2 R.C.S. 541, établit clairement qu'il est approprié de tenir compte des rubriques des lois et de l'historique d'un article comme moyen d'en interpréter l'objet.

Bref, dans le contexte des commissions secrètes, l'expression «par corruption» signifie que leur existence n'a pas été divulguée. Cette définition offre une certaine symétrie entre les deux infractions constituées par l'al. 426(1)*a*). En ce qui concerne l'acceptant-agent, l'expression «par corruption» signifie que l'agent n'a pas divulgué l'existence du paiement au commettant d'une façon appropriée et en temps opportun. En ce qui concerne le donneur, l'expression «par corruption» signifie que la récompense a été donnée dans l'espoir et avec l'intention que l'agent n'en divulgue pas l'existence au commettant, d'une façon adéquate et en temps opportun.

(ii) Quelle est la norme appropriée de divulgation?

Quelle est alors l'étendue de la divulgation attendue d'un agent? En d'autres termes, jusqu'à quel point le ministère public doit-il prouver la non-divulgation s'il veut établir la culpabilité d'un agent en vertu de l'art. 426? Dans l'arrêt *Kelly*, la Cour d'appel de la Colombie-Britannique, à la

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disclosure "must be adequate and full in the sense that the principal must be specifically advised, or it be otherwise made so crystal clear that he could not deny he ought to have known" (p. 160). The Supreme Court of Nova Scotia, Appeal Division in *R. v. Arnold* (1991), 65 C.C.C. (3d) 171 agreed with this standard. These courts held that there must be full, frank and fair disclosure made by the agent. On the other hand, Hutcheon J.A. dissenting in *Kelly* stated in *obiter*, that a standard of "full, frank and fair disclosure" would be too high for criminal law and that "partial disclosure may be sufficient".

Once again a consideration of the aim of s. 426 may be of assistance in determining the requisite standard of disclosure. The policy motivating the prohibition of secret commissions is the protection of vulnerable principals and the preservation of the integrity of the agency relationship. A requirement that disclosure of a commission be made by the agent promotes the objective of this section. Indeed, disclosure is essential to alert the principal to the existence of conflict of interest situations. In the absence of disclosure, the principal has no way of knowing if the agent is truly acting in the principal's best interests and cannot determine whether the advice of the agent should be accepted.

If the object of the section is to be attained, then adequate and timely disclosure must be required of the agent. A general and vague disclosure that the agent is receiving commissions will not meet the objective of this section. The agent must disclose the nature of the benefit which is being received, the amount of that benefit calculated to the best of the agent's ability and the source of the benefit. It may not be possible for the agent to be exact as to the amount of commission which will be received. It will suffice if a reasonable effort is made to alert the principal as to the approximate amount and source of commission to be received. Obviously, the principal will be influenced by the amount of benefit the agent is receiving. The greater the ben-

majorité, a conclu que la divulgation [TRADUCTION] «doit être appropriée et complète en ce sens que le commettant doit être expressément informé de l'existence des commissions ou elle doit être tellement limpide que le commettant ne pourrait nier qu'il aurait dû être au courant» (p. 160). Dans l'arrêt *R. c. Arnold* (1991), 65 C.C.C. (3d) 171, la Section d'appel de la Cour suprême de la Nouvelle-Écosse a accepté cette norme. Ces tribunaux ont conclu que l'agent doit faire une divulgation complète, franche et impartiale. Par contre, le juge Hutcheon, dissident dans l'arrêt *Kelly*, mentionne en *obiter* qu'une norme de «divulgation complète, franche et impartiale» est trop exigeante du point de vue du droit pénal et qu'une [TRADUCTION] «divulgation partielle pourrait être suffisante».

De nouveau, l'examen de l'objet de l'art. 426 peut nous aider à déterminer la norme requise de divulgation. L'interdiction des commissions secrètes repose sur le principe de la protection des commettants vulnérables et de la préservation de l'intégrité du mandat. En exigeant de l'agent qu'il divulgue la réception d'une commission, on contribue à l'atteinte de l'objectif de l'article. En fait, la divulgation de l'existence d'une commission est essentielle pour attirer l'attention du commettant sur les risques de conflits d'intérêts. En cas de non-divulgation, le commettant n'a aucun moyen de savoir si l'agent agit réellement au mieux des intérêts qu'il représente et il ne peut déterminer s'il devrait accepter les conseils de l'agent.

Pour atteindre l'objet de l'article, on doit exiger de l'agent qu'il divulgue d'une façon appropriée et en temps opportun l'existence d'une commission. Une divulgation générale et vague du fait que l'agent reçoit des commissions ne permet pas d'atteindre cet objectif. L'agent doit divulguer la nature du bénéfice reçu, son montant calculé le mieux possible ainsi que sa source. Il se peut que l'agent ne soit pas en mesure de déterminer avec exactitude le montant de la commission qu'il recevra. Il suffira qu'il déploie des efforts raisonnables pour attirer l'attention du commettant sur le montant approximatif et la source de la commission à recevoir. De toute évidence, le commettant sera influencé par le montant du bénéfice reçu par

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efit to the agent, the greater the agént's conflict of interest, and commensurately the greater the risk for the principal. The disclosure must be timely in the sense that the principal must be made aware of the benefit as soon as possible. Certainly the disclosure must be made at the point when the reward may influence the agent in relation to the principal's affairs. It is essential then that the agent clearly disclose to the principal as promptly as possible the source and amount or approximate amount of the benefit.

It is only if the disclosure is both adequate and timely that the agency relationship would be protected. With this knowledge, the principal would then be able to determine whether, and to what extent, to rely upon the advice given by the agent. It would be preferable if the disclosure were made in writing.

It is clear that KPA's clients were not aware that KPA accepted a sales commission from Qualico for each Qualico MURB sold to KPA clients. At their initial meeting with new clients, KPA personnel described the history of the firm, the services that the firm could provide and the various sources of compensation that KPA received. While the entire presentation took approximately one and a half hours, the explanation of sources of remuneration took less than five minutes. Such a vague and general disclosure is not sufficient to meet the objectives of s. 426.

At the time of the Qualico sales, there was no evidence that the clients were told that KPA was to receive commissions from Qualico. Kelly himself advised KPA associates that he did not want to put in writing any further disclosure concerning sources of remuneration for the MURB project. While the Offering Memoranda for the Qualico MURBs contained two one-line references to "Issuing and Sales Costs" for the projects, there was no specific reference to the fact that it was the appellant who was to receive these costs as a commission. Thus, in this case, it certainly could not be said that the disclosure was adequate and

l'agent. Plus le bénéfice de l'agent sera élevé, plus le conflit d'intérêts sera important et, toute proportion gardée, plus le risque sera grand pour le commettant. La divulgation doit être faite en temps opportun en ce sens que le commettant doit être informé de l'existence du bénéfice dès que possible. Certes, la divulgation doit être faite au moment où la récompense risque d'influencer l'agent relativement aux affaires du commettant. En conséquence, il est essentiel que l'agent divulgue clairement au commettant d'une façon aussi diligente que possible la source et le montant, exact ou approximatif, du bénéfice.

Le rapport découlant du mandat ne sera protégé que dans le cas où la divulgation est à la fois appropriée et faite en temps opportun. Muni de ces renseignements, le commettant pourra alors déterminer s'il doit se fier aux conseils de l'agent et dans quelle mesure. Il serait préférable que cette divulgation soit faite par écrit.

Il est évident que les clients de KPA ne savaient pas qu'elle avait accepté une commission de vente de Qualico pour chaque IRLM de cette dernière vendu aux clients de KPA. À la rencontre initiale avec les nouveaux clients, le personnel de KPA faisait l'historique de l'entreprise, décrivait les services qu'elle offrait et ses diverses sources de rémunération. La présentation durait environ une heure à une heure et demie, mais on consacrait moins de cinq minutes aux explications sur les sources de rémunération. Une divulgation aussi vague et générale n'est pas suffisante pour atteindre les objectifs de l'art. 426.

Rien ne prouve que les clients ont été mis au courant des commissions reçues de Qualico au moment où les ventes ont été effectuées. Kelly luimême a avisé les associés de KPA qu'il ne voulait pas divulguer par écrit des renseignements additionnels concernant les sources de rémunération du projet d'IRLM. Les notices d'offre pour les IRLM de Qualico renfermaient deux mentions d'une ligne traitant des [TRADUCTION] «Frais d'émission et de vente» pour les projets, mais il n'y avait aucune mention expresse du fait que c'était l'appelant qui devait recevoir ces frais à titre de commissions. Par conséquent, en l'espèce, on ne peut cer-

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timely. As well it can be seen that Kelly was aware of the extent of the disclosure and made a conscious decision to limit and restrict it. There was then cogent evidence upon which the convictions of the appellant could properly be based.

(iii) Corrupt Bargain

Is the Crown required to prove that there was a corrupt bargain between the giver and taker of the benefit? I think not. That was the basis of Hutcheon J.A.'s dissent. He held that the existence of a "corrupt bargain" is a pre-requisite to the commission of the offence described in s. 426. Hutcheon J.A.'s position is that there must be a guilty giver and a guilty taker in order for the Crown to secure a conviction under s. 426. The corrupt bargain approach focuses on the relationship between the agent and the third party rather than on the critical relationship which exists between the agent and principal.

The requirement of both a corrupt giver and a corrupt taker collapses the two independent provisions of s. 426(1)(*a*). The use of the disjunctive "or" in s. 426(1)(*a*) must mean that the section applies to either the giver or the taker. The provision need not apply to both at the same time. This interpretation I believe is supported by the obvious intent and aim of the section itself.

To repeat, the aim of s. 426 is to protect the principal in the conduct of the principal's affairs against people who might use or attempt to make use of the principal's agent. The section is concerned with the integrity of the agent and the right of the principal to rely upon the agent's integrity. Thus, if the agent/taker secretly accepts a commission to influence the principal's affairs there ought to be a finding of guilt whether or not the expectation and intention of the giver was that the taker would not disclose the benefit to the principal in an adequate and timely manner.

tainement pas dire qu'il y a eu une divulgation faite de façon appropriée et en temps opportun. On peut constater également que Kelly connaissait l'étendue de la divulgation et qu'il a pris consciemment la décision de la restreindre. Il y avait donc une preuve forte pouvant fonder la déclaration de culpabilité de l'appelant.

(iii) Affaire entachée de corruption

Le ministère public doit-il prouver l'existence d'une affaire entachée de corruption entre le donneur et l'acceptant du bénéfice? À mon avis, il n'a pas à le faire. Il s'agit là du point sur lequel le juge Hutcheon a exprimé sa dissidence. Pour lui, l'existence d'une «affaire entachée de corruption» est une condition préalable à la perpétration de l'infraction prévue à l'art. 426. À son avis, il doit y avoir un donneur coupable et un acceptant coupable pour que le ministère public puisse obtenir une déclaration de culpabilité en vertu de l'art. 426. L'analyse fondée sur une affaire entachée de corruption met l'accent sur le rapport entre l'agent et la tierce partie plutôt que sur le rapport essentiel qui existe entre l'agent et le commettant.

Exiger que le donneur et l'acceptant aient tous deux agi par corruption, c'est oublier l'existence des deux dispositions indépendantes de l'al. 426(1)*a*). L'emploi de «selon le cas» à l'al. 426(1)*a*) doit vouloir dire que l'article s'applique soit au donneur soit à l'acceptant. La disposition n'a pas besoin de s'appliquer aux deux en même temps. À mon avis, cette interprétation est appuyée par l'intention et l'objet évidents de l'article.

Donc, l'art. 426 a pour objet de protéger le commettant contre les personnes qui pourraient avoir recours ou tenter d'avoir recours à son agent dans la conduite de ses affaires. Cet article s'intéresse à l'intégrité de l'agent et au droit du commettant de se fier à cette intégrité. En conséquence, si l'agent accepte secrètement une commission dans le but d'influencer les affaires du commettant, il doit être déclaré coupable, que le donneur ait ou non eu l'intention que l'acceptant ne divulgue pas au commettant, d'une façon appropriée et en temps opportun, l'existence du bénéfice.

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The question of the corrupt bargain requirement is resolved by the definition of the offence contained in the section. Section 426(1)(*a*)(ii) provides that a crime is committed when the agent/taker knowingly accepts a benefit as consideration for influencing the affairs of the agent's principal without sufficient disclosure. In the case of a prosecution of an agent/taker under this section, the giver of the benefit must have paid the benefit to the taker as consideration for influencing the taker's principal. However, there is no requirement under s. 426(1)(*a*)(ii) for the Crown to prove that the giver was corrupt in the sense that the giver knew, expected or intended that the agent/taker would not disclose the benefit to the principal in an adequate and timely manner. Section 426 provides for the conviction of a guilty taker regardless of the guilt or innocence of the giver. A corrupt bargain is not required by the section.

La définition de l'infraction contenue dans l'article nous permet de trancher la question de savoir s'il faut prouver l'existence d'une affaire entachée de corruption. En vertu du sous-al. 426(1)*a*)(ii), commet un acte criminel l'agent qui accepte sciemment un bénéfice, à titre de contrepartie pour influencer les affaires de son commettant, sans l'avoir divulgué d'une façon suffisante. Lorsqu'une poursuite est intentée contre un agent-acceptant en vertu de cet article, le donneur doit avoir versé le bénéfice à l'acceptant à titre de contrepartie pour influencer le commettant de l'acceptant. Toutefois, en vertu du sous-al. 426(1)*a*)(ii), le ministère public n'a pas à établir que le donneur a agi par corruption en ce sens qu'il savait, prévoyait ou s'attendait que l'agent-acceptant ne divulguerait pas l'existence du bénéfice au commettant d'une façon appropriée et en temps opportun. L'article 426 prévoit que l'acceptant peut être déclaré coupable, sans égard à la culpabilité ou à l'innocence du donneur. Cet article n'exige pas l'existence d'une affaire entachée de corruption.

Summary

There are then three elements to the *actus reus* of the offence set out in s. 426(1)(*a*)(ii) as they apply to an accused agent/taker with regard to the acceptance of a commission:

(1) the existence of an agency relationship;

(2) the accepting by an agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principal; and

(3) the failure by the agent to make adequate and timely disclosure of the source, amount and nature of the benefit.

The requisite *mens rea* must be established for each element of the *actus reus*. Pursuant to s. 426(1)(*a*)(ii), an accused agent/taker:

(1) must be aware of the agency relationship;

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L'*actus reus* de l'infraction prévue au sous-al. 426(1)*a*)(ii) comporte donc trois éléments qui devront être établis en cas d'accusation contre un agent-acceptant relativement à l'acceptation d'une commission:

(1) l'existence d'un mandat;

(2) l'acceptation par l'agent d'un bénéfice à titre de contrepartie pour faire ou s'abstenir de faire un acte relatif aux affaires de son commettant;

(3) l'omission de la part de l'agent de divulguer d'une façon appropriée et en temps opportun la source, le montant et la nature du bénéfice.

La *mens rea* requise doit être établie pour chacun des éléments de l'*actus reus*. Conformément au sous-al. 426(1)*a*)(ii), l'agent-acceptant accusé doit:

(1) être au courant de l'existence du mandat;

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(2) must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal; and

(3) must be aware of the extent of the disclosure to the principal or lack thereof.

If the accused was aware that some disclosure was made then it will be for the court to determine whether, in all the circumstances of the particular case, it was in fact adequate and timely.

The word "corruptly" in the context of secret commissions means secretly or without the requisite disclosure. There is no "corrupt bargain" requirement. Thus, it is possible to convict a taker of a reward or benefit despite the innocence of the giver of the reward or benefit. Non-disclosure will be established for the purposes of the section if the Crown demonstrates that adequate and timely disclosure of the source, amount and nature of the benefit has not been made by the agent to the principal.

In the case at bar, Qualico paid the standard commission to Kelly. It is clear that the nature of the commission was to encourage Kelly to influence his clients. Kelly was aware of this intention. He accepted the commission secretly and influenced the affairs of his principals. The payment of the commission was not disclosed in an adequate and timely manner. The Crown was not required to prove that Qualico's actions in paying the commissions were corrupt or part of a corrupt bargain with Kelly.

The Crown therefore has established all the elements requisite for conviction under s. 426.

Disposition

In the result the appeal must be dismissed.

(2) avoir accepté sciemment le bénéfice à titre de contrepartie pour un acte à être fait relativement aux affaires du commettant;

(3) être au courant de l'étendue de la divulgation au commettant ou de l'absence de divulgation.

Si l'accusé savait qu'il y a eu divulgation, il reviendra alors à la cour de déterminer si, compte tenu de toutes les circonstances de l'affaire, elle a été faite de façon appropriée et en temps opportun.

Dans le contexte des commissions secrètes, l'expression «par corruption» signifie qu'elles ont été versées secrètement ou qu'elles n'ont pas été divulguées comme il se doit. L'existence d'une «affaire entachée de corruption» n'est pas nécessaire. En conséquence, l'acceptant d'une récompense ou d'un bénéfice peut être déclaré coupable malgré l'innocence du donneur. Pour l'application de l'article, le ministère public aura établi la non-divulgation s'il démontre que l'agent n'a pas divulgué au commettant d'une façon appropriée et en temps opportun la source, le montant et la nature du bénéfice.

En l'espèce, Qualico a payé la commission habituelle à Kelly. De toute évidence, la commission visait à inciter Kelly à influencer ses clients. Kelly était au courant de cette intention. Il a accepté la commission secrètement et influencé les affaires de ses commettants. Le paiement de la commission n'a pas été divulgué d'une façon appropriée et en temps opportun. Le ministère public n'avait pas à établir que Qualico avait agi par corruption lors du paiement des commissions, ou qu'il s'agissait d'une affaire entachée de corruption conclue avec Kelly.

En conséquence, le ministère public a prouvé tous les éléments requis pour obtenir une déclaration de culpabilité en vertu de l'art. 426.

Dispositif

Le pourvoi est par conséquent rejeté.

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The following are the reasons delivered by

SOPINKA J. (dissenting)—I have had the opportunity of reading the reasons of Cory J. herein but unfortunately I cannot agree with the result that he has reached. I agree with him that the relationship of principal and agent is an important one and that the trust on which it is dependent should be fostered by the law. I do not agree that this should be done by criminalizing breaches of duty unless Parliament has clearly indicated its intention to do so. More specifically, I cannot accept that the unilateral act of the appellant in failing to make full disclosure converts a breach of duty into criminal conduct.

The Purpose and Meaning of Section 426

A review of the history of the section shows that it deals with the giving of secret commissions or bribes to or by an agent. These benefits or rewards must have as their purpose the influencing of the agent in the exercise of his or her duty to the principal. I adopt the following statement of Laidlaw J.A. in *R. v. Brown* (1956), 116 C.C.C. 287 (Ont. C.A.), at p. 289, as a definitive statement of the purpose of the legislation:

> The evil against which that provision in the Criminal Code is directed is secret transactions or dealings with a person in the position of agent concerning the affairs or business of the agent's principal. It is intended that no one shall make secret use of the agent's position and services by means of giving him any kind of consideration for them. The agent is prohibited from accepting or offering or agreeing to accept any consideration from anyone other than his principal for any service rendered with relation to the affairs or business of his principal. It is intended to protect the principal in the conduct of his affairs and business against persons who might make secret use, or attempt to make such use, of the services of his agent. He is to be free at all times and under all circumstances from such mischievous influence. Likewise, it is intended that the agent shall be protected against any person who is willing to make use secretly of his position and services. Everyone is prohibited from entering into secret transactions under which he "gives, offers or agrees to give or offer" consideration to an

Version française des motifs rendus par

LE JUGE SOPINKA (dissident)—J'ai eu l'occasion de lire les motifs du juge Cory, mais, malheureusement, je ne peux souscrire à sa conclusion. Je conviens avec lui de l'importance du rapport commettant-agent et de la nécessité de protéger légalement la confiance sur laquelle il repose. Toutefois, contrairement au juge Cory, je ne crois pas que la réponse à cette nécessité réside dans la criminalisation de l'inexécution d'obligation à moins que le législateur n'ait clairement manifesté son intention à cet effet. Plus particulièrement, je ne peux convenir que le défaut de l'appelant de faire une divulgation complète, geste unilatéral, transforme l'inexécution d'obligation en un acte criminel.

L'objet et le sens de l'art. 426

On constate, à l'étude de l'historique de l'article, que celui-ci porte sur le versement ou la réception par un agent de commissions secrètes ou de pots-de-vin. Ces bénéfices ou récompenses doivent viser à influencer l'agent dans l'exercice de ses fonctions envers le commettant. Je fais mien, à titre d'énoncé définitif de l'objet de la disposition législative, l'exposé du juge Laidlaw dans *R. c. Brown* (1956), 116 C.C.C. 287 (C.A. Ont.), à la p. 289:

> [TRADUCTION] Le problème auquel veut remédier cette disposition du Code criminel est celui des opérations secrètes conclues avec une personne dans la situation d'un agent relativement aux affaires ou à l'entreprise de son commettant. Elle vise à ce que personne ne profite secrètement de la situation de l'agent et de ses services en retour d'une quelconque contrepartie. L'agent ne peut offrir qu'à son commettant, accepter ou convenir d'accepter que de ce dernier une contrepartie pour tout service rendu relativement à ses affaires ou à son entreprise. L'article est également destiné à protéger le commettant dans la gestion de ses affaires ou de son entreprise contre ceux qui pourraient profiter secrètement, ou tenteraient de profiter des services de son agent. Ce dernier ne doit en aucun temps et dans aucune circonstance subir cette influence malveillante. La disposition cherche également à protéger l'agent contre toute personne disposée à profiter secrètement de sa situation et de ses services. Il est interdit à quiconque de conclure des opérations secrètes en vertu desquelles il

agent for services with relation to the affairs or business of his principal. [Emphasis added.]

What the section proscribes are transactions or dealings designed to influence an agent in his conduct of the principals' affairs. It seeks to proscribe the various stages of such transactions or dealings. It applies at the formative stage by prohibiting an offer or demand. It applies to an agreement and it applies to dealings that are completed by the exchange of benefits or rewards.

What the section seeks to achieve is to keep the agent free of the influence of third parties who seek to reward the agent in return for some act affecting the affairs of the principal. In *R. v. Morris* (1988), 64 Sask. R. 98 (C.A.), it was stated (at p. 112):

He must be free at all times and under all circumstances from such an influence. Likewise, the intent is to protect the employee from being approached by people who are willing to make use secretly of his position and services and who are willing to reward him or pay him for doing so.

Accordingly, when an agent is charged as the person receiving a benefit or reward, it must be established that he or she accepted it as a *quid pro quo* to influence him or her. This requires proof that it was offered, promised or given for this purpose and that it was within the agent's knowledge or belief that it was given for this purpose.

Considerable reliance was placed by the majority of the Court of Appeal on the judgments of the Court of Criminal Appeal of Victoria in *R. v. Gallagher*, *infra*. In that case an agent was prosecuted for receipt of gifts in contravention of the Victoria version of the corruption law. Section 176(1)(b) of the *Crimes Act* 1958 (Vict.) provided:

Whosoever being an agent corruptly receives or solicits from any person for himself or for any other person any valuable consideration—

. . .

«donne ou offre, ou convient de donner ou d'offrir» une contrepartie à un agent pour ses services relativement aux affaires ou à l'entreprise de son commettant. [Je souligne.]

La disposition interdit toute opération destinée à influencer l'agent dans sa gestion des affaires du commettant. Elle cherche donc à proscrire les différentes étapes de ces opérations. Elle s'applique au stade de la formation en interdisant toute offre ou demande, au stade de l'accord et enfin au stade où les opérations sont complétées par le paiement de bénéfices ou de récompenses.

L'article 426 cherche à mettre l'agent à l'abri de l'influence de tierces parties qui souhaitent le récompenser en retour de quelque acte influant sur les affaires du commettant. Dans *R. c. Morris* (1988), 64 Sask. R. 98 (C.A.), on dit, à la p. 112:

[TRADUCTION] Il ne doit en aucun temps et dans aucune circonstance subir ce genre d'influence. La disposition cherche également à éviter que l'employé soit sollicité par des personnes disposées à profiter secrètement de sa situation et de ses services en le récompensant ou en le payant en retour.

En conséquence, si un agent est accusé d'avoir reçu une récompense ou un bénéfice, il faut démontrer qu'il l'a accepté à titre de contrepartie visant à l'influencer. Pour ce faire, il faut prouver qu'elle a été offerte, promise ou donnée dans cette intention et que l'agent savait ou croyait qu'elle a été ainsi donnée.

La Cour d'appel, à la majorité, s'est grandement fiée aux jugements de la Court of Criminal Appeal de Victoria rendus dans *R. c. Gallagher*, ci-dessous. Dans cette affaire, un agent était accusé d'avoir reçu des avantages en contravention de la disposition de Victoria en matière de corruption. L'alinéa 176(1)b) de la *Crimes Act* 1958 (Vict.) est ainsi libellé:

[TRADUCTION] Commet une infraction criminelle [. . .] quiconque, étant un agent, par corruption, accepte ou exige de qui que ce soit, pour lui-même ou pour une autre personne, une contrepartie de quelque sorte—

. . .

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(b) the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business;

. . .

shall be guilty of an indictable offence....

In the first appeal (1985), 16 A. Crim. R. 215, the following charge to the jury was approved (at p. 222):

The fourth and final element of the crime alleged in each of the counts is that the agent corruptly received a valuable consideration. This looks to the state of mind of the agent at the time he received the valuable consideration. He acted corruptly if he then believed that the person giving him the valuable consideration intended that it should influence him to show favour or to forbear to show disfavour to some person in relation to his principal's affairs or business. It is irrelevant whether the agent himself intended by the receipt of the valuable consideration to show favour or forbear to show disfavour or not. Indeed, it is irrelevant as to whether or not he did show favour or forbear to show disfavour. If he believed that the person giving him the valuable consideration so intended to influence him, that is enough, because by accepting it he thereby had his loyalty divided. [Emphasis added.]

A new trial was, however, ordered on other grounds. The accused was convicted at the new trial and appealed again. See *R. v. Gallagher* (1987), 29 A. Crim. R. 33. The Court of Appeal confirmed in the latter appeal that the recipient must believe that the giver intends that the benefit should influence the taker to show favour to the giver in the taker's dealings with the affairs of the principal. It was on this basis that the taker could be found guilty but the giver not. At page 35 the court stated: "if the recipient mistakenly believed that the giver intended to influence him the giver would not be acting corruptly but the recipient would be."

Section 426 is more emphatic than the Victoria statute that the purpose of the payment must be to influence the agent to do or forbear from doing some act relating to the affairs of the principal. The

b) dont l'acceptation ou la perspective est susceptible, de quelque façon, d'influencer l'agent ou de l'amener à témoigner ou à s'abstenir de témoigner de la faveur ou de la défaveur à une personne quant aux affaires ou à l'entreprise de son commettant;

Au cours du premier appel (1985), 16 A. Crim. R. 215, on a approuvé la directive suivante au jury, à la p. 222:

[TRADUCTION] Le quatrième et dernier élément du crime présumé dans chaque chef d'accusation porte sur le fait que l'agent a, par corruption, reçu une contrepartie. Cet élément recherche l'état d'esprit de l'agent au moment où il a reçu la contrepartie. Il a agi par corruption s'il croyait alors que la personne lui donnant cette contrepartie avait l'intention de l'influencer pour qu'il témoigne ou s'abstienne de témoigner de la faveur ou de la défaveur à une personne quant aux affaires ou à l'entreprise de son commettant. Le fait que l'agent lui-même ait accepté la contrepartie dans l'intention de témoigner de la faveur ou de s'abstenir de témoigner de la défaveur ou non n'est pas pertinent. En fait, qu'il ait ou non effectivement témoigné de la faveur ou se soit abstenu de témoigner de la défaveur n'est pas pertinent. Il suffit qu'il ait cru que la personne lui donnant la contrepartie cherchait à l'influencer, car en l'acceptant il compromettait sa loyauté. [Je souligne.]

Toutefois, on a ordonné un nouveau procès pour des motifs différents. L'accusé a été déclaré coupable et il a de nouveau interjeté appel. Voir *R. c. Gallagher* (1987), 29 A. Crim. R. 33. La Cour d'appel a confirmé dans le deuxième appel que le bénéficiaire doit croire que le donneur cherche à l'influencer pour qu'il lui témoigne de la faveur dans sa gestion des affaires du commettant. Contrairement au donneur, l'acceptant pouvait être déclaré coupable pour ce motif. À la page 35, la cour a dit: [TRADUCTION] «si, par méprise, le bénéficiaire a cru que le donneur souhaitait l'influencer, le donneur n'a pas agi par corruption, mais le bénéficiaire l'a fait.»

L'article 426 précise davantage que la loi de Victoria que le paiement doit être versé dans le but d'amener l'agent à accomplir ou à s'abstenir d'accomplir un acte relativement aux affaires du com-

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agent is guilty only if the benefit or reward is "as consideration for doing or forbearing to do, or for having done or forborne to do, any act relating to the affairs or business of his principal. . .". This requires either that the benefit is in fact offered for this purpose or that the recipient believes that it is. A benefit cannot be received in consideration for doing such an act if it is neither intended for that purpose by the giver nor believed to be so by the taker. Ordinarily, in any transaction the "consideration for" is the *quid pro quo* for each party's obligation. The recipient of a promise or a benefit as a result of a promise does not determine its character unilaterally. Its character is determined by the promisor with the agreement of the promisee.

In most cases, therefore, the offence against the agent will be made out by establishing that he or she accepted a reward offered, promised or given for the purpose of influencing the agent. The offence is complete without the necessity of showing that the agent was in fact influenced in his or her actions. As pointed out by the Court of Appeal in *Gallagher*, it is the state of mind of the agent in accepting the consideration that is crucial. If the agent's state of mind is affected by the temptation to affect the manner in which his duty is carried out by the expectation of a benefit or reward the evil against which the provision is aimed is engaged. For the same reason if the agent demands a benefit in return for some act or forbearance *vis-à-vis* the principal the section applies. The agent's loyalty has been compromised by the expectation of reward. It is for this reason that an agent who believes that a benefit is being offered as consideration for affecting the affairs of his principal is guilty even if it was not in fact offered for this purpose.

The use of the word "corruptly" serves to emphasize the requirement that the acts of the giver or taker are not innocently done but *mala fide* in the sense of intentionally doing what the section otherwise forbids. In *R. v. Brown*, *supra*, at p. 289, "corruptly" was stated to mean "the act of

mettant. L'agent n'est coupable que si la récompense ou le bénéfice est versé «à titre de contrepartie pour faire ou s'abstenir de faire, ou pour avoir fait ou s'être abstenu de faire, un acte relatif aux affaires ou à l'entreprise de son commettant . . .» Le bénéfice doit, en fait, être offert dans cette intention ou le bénéficiaire doit croire qu'il l'est. Si le donneur n'avait pas cette intention et si l'acceptant ne croyait pas qu'il l'avait, le bénéfice ne peut pas être considéré comme contrepartie d'un tel acte. Généralement, dans toute opération, la «contrepartie» est donnée en compensation pour l'obligation de chaque partie. Le bénéficiaire d'une promesse ou d'un bénéfice résultant d'une promesse n'en détermine pas la nature unilatéralement. Celle-ci est déterminée par celui qui fait la promesse avec l'accord de celui à qui elle est faite.

Par conséquent, dans la plupart des cas, on établira la culpabilité de l'agent en démontrant qu'il a accepté une récompense offerte, promise ou donnée dans l'intention de l'influencer. L'infraction est consommée sans qu'il soit nécessaire de démontrer que les actes de l'agent ont effectivement été influencés. Comme l'a souligné la Cour d'appel dans *Gallagher*, le facteur décisif réside dans l'état d'esprit de l'agent qui accepte la contrepartie. Si ce dernier est influencé par la tentation de modifier la façon d'exercer ses fonctions en raison de l'espoir de recevoir un bénéfice ou une récompense, le problème auquel la disposition cherche à remédier se pose. Pour le même motif, si l'agent exige un bénéfice en retour d'un acte ou d'une abstention à l'endroit du commettant, l'article s'applique. La loyauté de l'agent a été affectée par l'espoir d'une récompense. Pour ce motif, l'agent qui croit qu'un bénéfice est offert à titre de contrepartie visant à influer sur les affaires de son commettant est coupable même si, en fait, il n'a pas été offert dans ce but.

L'utilisation de l'expression «par corruption» vise à souligner la nécessité que le donneur ou l'acceptant n'agisse pas en toute innocence, mais de mauvaise foi, en faisant intentionnellement ce que la disposition interdit par ailleurs. Dans *R. c. Brown*, précité, à la p. 289, on a déclaré que l'ex-

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doing the very thing which the statute forbids". In *R. v. Gross* (1945), 86 C.C.C. 68 (Ont. C.A.), Roach J.A., while emphasizing the purpose of the gift or consideration, added that it must be *mala fide*. He stated (at p. 75):

> The word "corruptly" in the section sounds the key-note to the conduct at which the section is aimed. The evil is the giving of a gift or consideration, not *bona fide* but *mala fide*, and designedly, wholly or partially, for the purpose of bringing about the effect forbidden by the section.

I do not agree that non-disclosure by the offeree is synonymous with the term "corruptly". While in some situations to which the section applies disclosure or the intention to disclose on the part of the offeree may negative *mala fides*, in others the fact of disclosure or intention to disclose is irrelevant. For example, when the giver is accused he or she may be guilty if he or she simply makes an offer as consideration for affecting the affairs of the principal. Provided that the intention of the giver is that the benefit not be disclosed to the principal, the offence is complete when the offer is made. The intention on the part of the offeree to disclose or indeed actual disclosure on his or her part is irrelevant. Inasmuch as the giver would still have acted corruptly, it cannot be treated as if the two terms were interchangeable. I regard disclosure and non-disclosure as one factor which in some applications of the section may be relevant in respect of the mental element of the offence. In cases in which the giver is charged, the offence is complete when the offer is made, accepted or the benefit or reward taken with the requisite state of mind. The cases to which I have referred make it plain that the gravamen of the offence as regards the recipient is the influence on the mind of the agent at the time at which one of these events takes place. If subsequent conduct is not relevant to show that the agent actually was or was not influenced, subsequent disclosure is also not relevant to excuse an offence which is complete.

pression «par corruption» s'entend de l'acte de [TRADUCTION] «faire la chose même que la loi interdit». Dans *R. c. Gross* (1945), 86 C.C.C. 68 (C.A. Ont.), le juge Roach, en mettant l'accent sur le but de l'avantage ou contrepartie, a ajouté qu'il doit être de mauvaise foi. Il s'est exprimé ainsi (à la p. 75):

> [TRADUCTION] L'expression «par corruption» dans l'article donne le ton au comportement visé. Le problème réside dans le fait de donner un avantage ou une contrepartie, non pas de bonne foi, mais de mauvaise foi, et expressément, en tout ou en partie, dans l'intention d'obtenir l'effet interdit par l'article.

Je ne peux convenir que la non-divulgation par celui qui reçoit l'offre est synonyme de l'expression «par corruption». Bien que dans certaines situations auxquelles l'article s'applique la divulgation ou l'intention de divulguer de la part de celui qui reçoit l'offre puisse neutraliser la mauvaise foi, dans d'autres, la divulgation n'est pas un facteur pertinent. Ainsi, si le donneur est accusé, il peut être coupable s'il a simplement présenté une offre à titre de contrepartie pour influer sur les affaires du commettant. Pourvu que le donneur ait l'intention que le bénéfice ne soit pas divulgué au commettant, l'infraction est perpétrée dès que l'offre est faite. L'intention de divulguer de celui qui reçoit l'offre ou, en fait, la véritable divulgation, n'est pas pertinente. Dans la mesure où le donneur aurait tout de même agi par corruption, on ne peut considérer les deux termes interchangeables. À mon avis, la divulgation et la non-divulgation sont un seul facteur qui, dans certaines applications de l'article, peut être pertinent à l'égard de l'élément moral de l'infraction. Dans les cas où le donneur est accusé, l'infraction est perpétrée dès que l'offre est faite ou acceptée ou que la récompense ou le bénéfice est accepté dans l'état d'esprit requis. Il ressort des cas mentionnés précédemment que l'élément essentiel de l'infraction à l'égard du bénéficiaire est l'influence sur l'esprit de l'agent au moment où l'un de ces événements se déroule. Si le comportement subséquent n'est pas pertinent pour démontrer que l'agent a été ou n'a pas été véritablement influencé, la divulgation subséquente est elle aussi non pertinente pour excuser une infraction consommée.

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Application to this Case

The words of the charges in this case make it clear that the offences charged are in relation to a transaction with Qualico pursuant to which the appellant accepted consideration for inducing his clients to invest in Mirror Development. Count 1 which is typical reads as follows:

> Between the 1st day of June, A.D. 1980, and the 31st day of March, A.D. 1983, at the City of Vancouver, Province of British Columbia, being an agent for Janet BIGA, Michael DRISCOLL, Bruce HARRISON, Garry HENRY, and other clients of KELLY PETERS & ASSOCIATES LTD., did corruptly accept from QUALICO DEVELOPMENTS LTD. a reward or benefit, to wit, Two Hundred Sixty-Two Thousand Dollars ($262,000), as consideration for doing or having done an act relating to the affairs of Janet BIGA, Michael DRISCOLL, Bruce HARRISON, Garry HENRY, and other clients of KELLY PETERS & ASSOCIATES LTD., concerning the investments by the aforesaid persons in Mirror Developments, contrary to Section 383(1)(a) of the Criminal Code of Canada. [Emphasis added.]

The payments by Qualico were made to the appellant pursuant to an agreement that could not be said to be in consideration of the sale to clients of the appellant. The commissions were to be paid in consideration of a sale to whomever it was made. The agreement was entered into at arm's length and the commissions were the same amount as was paid to any other salesmen. While in many instances the appellant sold to his clients that was not because he was influenced by Qualico to do so nor because he believed that this was the intended purpose of either the agreement with Qualico or of the payments. The decision to sell to his clients was one that he made unilaterally. His failure to make full disclosure amounted to a breach of his duty but he is not guilty of the offence charged.

The majority of the Court of Appeal summed up the case against the appellant as follows:

> I think the statute requires a *transaction*, but that transaction need be no more than the giver paying the taker to do something in relation to his client's affairs, and the

Application à l'espèce

Il ressort du libellé des accusations en l'espèce que les infractions imputées sont relatives à une opération effectuée avec Qualico, en vertu de laquelle l'appelant a accepté une contrepartie pour amener ses clients à investir dans Mirror Development. Le premier chef d'accusation est ainsi libellé:

> [TRADUCTION] Entre le 1er juin 1980 et le 31 mars 1983, en la ville de Vancouver (Colombie-Britannique), étant un agent de Janet BIGA, Michael DRISCOLL, Bruce HARRISON, Garry HENRY et autres clients de KELLY PETERS & ASSOCIATES LTD., a, par corruption, accepté de QUALICO DEVELOPMENTS LTD. une récompense ou bénéfice, à savoir deux cent soixante-deux mille dollars (262 000 $), à titre de contrepartie pour faire ou avoir fait un acte relativement aux affaires de Janet BIGA, Michael DRISCOLL, Bruce HARRISON, Garry HENRY et autres clients de KELLY PETERS & ASSOCIATES LTD. concernant des investissements par les personnes susdites dans Mirror Developments, en contravention de l'alinéa 383(1)a) du Code Criminel du Canada. [Je souligne.]

Les paiements ont été versés par Qualico à l'appelant conformément à un accord et ne peuvent être considérés comme étant la contrepartie de la vente effectuée à des clients de l'appelant. Les commissions devaient être payées en contrepartie d'une vente faite à qui que ce soit. L'accord a été conclu sans lien de dépendance, et le montant des commissions était identique à celui payé à tout autre vendeur. Dans beaucoup de cas, l'appelant a vendu à ses clients; toutefois, il n'a pas vendu parce qu'il a été poussé par Qualico à le faire ni parce qu'il croyait que c'était là le but de l'accord avec Qualico ou des paiements. La décision de vendre à ses clients a été prise unilatéralement. Son défaut de divulguer de manière complète constitue une inexécution d'obligation, mais il n'est pas coupable de l'infraction imputée.

La Cour d'appel, à la majorité, a résumé l'affaire contre l'appelant de la façon suivante:

> [TRADUCTION] Je crois que la loi prévoit l'existence d'une *opération*, mais il suffit que le donneur paie l'acceptant pour accomplir quelque chose relativement aux

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taker knowing this. Such a transaction can be completely blameless in so far as the giver is concerned, and in the ordinary course of business. But the crime is committed by the taker who receives the money knowing the reason it is paid. That, in my view, is this case. [Emphasis added.]

((1989), 52 C.C.C. (3d) 137, at p. 155.)

With respect, applying this test to the facts of the case, the appellant ought to have been acquitted. The appellant did not know nor believe that Qualico was paying him to sell to his clients. This element is one that is stressed in the cases to which I have referred and which is totally absent in this case.

In the result I would allow the appeal and direct that an acquittal be entered in regard to each of the charges.

The following are the reasons delivered by

McLACHLIN J.—I have read the reasons of Sopinka J. and Cory J. and agree with Cory J. that the appeal should be dismissed. However, I have two concerns with respect to the reasons of Cory J. which require comment. Both are related to the lack of disclosure which constitutes an element of the *actus reus* of the offence, and an awareness of which constitutes an element of its *mens rea*.

I am satisfied that the aspect of the *mens rea* of the offence of taking a secret commission which is imported by the adverb "corruptly" may lie in awareness of the fact of non-disclosure. No corrupt bargain is required, for the reasons given by the majority below and Cory J. in this Court. Indeed, on the clear language of s. 426(1)(*a*)(ii) of the *Criminal Code*, R.S.C., 1985, c. C-46, the offence may be committed simply by making a "demand" for or "agreeing to accept" a reward, which alone is sufficient to negate the alleged concluded corrupt bargain requirement.

My difficulty relates to the time and nature of the disclosure necessary to negate this element of

affaires de son client et que l'acceptant le sache. Cette opération peut être complètement inoffensive du point de vue du donneur, et être dans le cours normal des affaires. Toutefois, l'acceptant commet un acte criminel s'il connaît la raison pour laquelle l'argent est versé. Selon moi, c'est le cas en l'espèce. [Je souligne.]

((1989), 52 C.C.C. (3d) 137, à la p. 155.)

Avec égards, si l'on applique ce critère aux faits de l'espèce, j'estime que l'appelant aurait dû être acquitté. Il ne savait ni ne croyait que Qualico le payait pour vendre à ses clients. Les cas mentionnés précédemment ont fait ressortir cet élément et, en l'espèce, il est totalement inexistant.

En conséquence, je suis d'avis d'accueillir le pourvoi et d'ordonner qu'un acquittement soit prononcé relativement à chaque accusation.

Version française des motifs rendus par

LE JUGE McLACHLIN—J'ai lu les motifs des juges Sopinka et Cory et je conviens avec ce dernier que le pourvoi doit être rejeté. Toutefois, les motifs du juge Cory me préoccupent à deux points de vue et je tiens à y apporter mes commentaires. Mes préoccupations visent l'absence de divulgation, qui constitue un élément de l'*actus reus*, et la connaissance de cette absence de divulgation, qui constitue un élément de la *mens rea*.

Je suis convaincue que la connaissance de la non-divulgation peut constituer l'aspect de la *mens rea* de l'infraction d'acceptation d'une commission secrète qui est sous-entendu par l'expression «par corruption». Pour les motifs exprimés par la Cour d'appel à la majorité et le juge Cory de notre Cour, il n'est pas nécessaire que l'affaire soit entachée de corruption. En fait, le sous-al. 426(1)*a*)(ii) du *Code criminel*, L.R.C. (1985), ch. C-46, établit clairement que l'infraction est commise simplement si l'agent «exige» ou «convient d'accepter» une récompense, ce qui en soi est suffisant pour contredire la prétendue nécessité d'une affaire conclue entachée de corruption.

J'éprouve des difficultés relativement au moment et à la nature de la divulgation qui permet-

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the *mens rea* of the offence. Cory J. states that there must be "timely" and "adequate" disclosure. In my view, the way he goes on to define these terms extends the ambit of the offence in a way which is inconsistent with the basic principles of criminal law.

The first problem is that of timeliness. Cory J. states that "[i]t is essential ... that the agent clearly disclose to the principal as promptly as possible the source and amount or approximate amount of the benefit" (emphasis added). He elaborates as follows (at p. 191):

> The disclosure must be timely in the sense that the principal must be made aware of the benefit as soon as possible. Certainly the disclosure must be made at the point when the reward may influence the agent in relation to the principal's affairs.

This passage begs a number of questions. When is the crime complete? What is meant by "as soon as possible"? Is it a defence for the agent to say that the point had not yet been reached when he or she might be influenced? If so, when is that point? To pose these questions is to admit of the possibility of a variety of different answers.

As analyzed by Cory J. this offence is quite different from the general run of criminal offences. An offence is complete upon commission of a particular act or acts, the *actus reus*, accompanied by the requisite blameworthy mental state, the *mens rea*. Thus, for example, the offence of assault is complete when a person without the consent of another applies force to that other person, the *actus reus*, and does so with the intention of applying force to that other person without that other person's consent. The act is committed with the necessary intent and the offence is complete in a single, unified transaction. Under Cory J.'s analysis of the offence of taking secret commissions the agent may commit part of the *actus reus*, the taking of the commission in the requisite circumstances, and do so with part of the *mens rea*, namely knowledge of the circumstances constituting the *actus reus* to that point. But his ultimate

tent de conclure à l'absence de cet élément de la *mens rea* de l'infraction. Le juge Cory précise que la divulgation doit être faite «de façon appropriée» et «en temps opportun». À mon avis, le juge Cory donne à ces expressions une interprétation qui élargit la portée de l'infraction d'une façon incompatible avec les principes du droit pénal.

La première difficulté vise le moment de la divulgation. Le juge Cory précise qu'«il est essentiel que l'agent divulgue clairement au commettant d'une façon aussi diligente que possible la source et le montant, exact ou approximatif, du bénéfice» (je souligne). Il apporte à ce sujet les précisions suivantes (à la p. 191):

> La divulgation doit être faite en temps opportun en ce sens que le commettant doit être informé de l'existence du bénéfice dès que possible. Certes, la divulgation doit être faite au moment où la récompense risque d'influencer l'agent relativement aux affaires du commettant.

Ce passage soulève un certain nombre de questions. Quand l'acte criminel est-il consommé? Qu'entend-on par l'expression «dès que possible»? Comme moyen de défense, l'agent peut-il prétendre que le moment n'était pas encore venu où il pouvait être influencé? Dans l'affirmative, quand arrive ce moment? Ces questions ouvrent la porte à toute une gamme de réponses.

L'analyse du juge Cory montre que cette infraction est fort différente de l'ensemble des infractions criminelles. Une infraction est consommée dès la perpétration d'un acte particulier, l'*actus reus*, accompagnée de l'état d'esprit coupable, la *mens rea*. Par exemple, l'infraction de voies de fait est consommée lorsqu'une personne emploie la force contre une autre personne sans son consentement, l'*actus reus*, et le fait d'une manière intentionnelle. L'acte est commis avec l'intention nécessaire et l'infraction est consommée en une seule opération. Selon l'analyse que fait le juge Cory de l'infraction d'acceptation de commissions secrètes, l'agent peut commettre une partie de l'*actus reus*, c'est-à-dire l'acceptation d'une commission dans les circonstances requises et le faire avec une partie de la *mens rea*, c'est-à-dire la connaissance des circonstances qui constitue jusqu'à ce point l'*actus reus*. Toutefois, la culpabilité de

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guilt is at that point uncertain, dependent upon whether he fails "to make adequate and timely disclosure of the source, amount and nature of the benefit", the remainder of the *actus reus*, with an awareness of "the extent of the disclosure to the principal or lack thereof", the remainder of the *mens rea*. Under Cory J.'s analysis the commission of part of this offence can be deferred in accordance with the prevailing circumstances. If at that point in time which a trial judge with the benefit of hindsight determines to have been "timely" the agent has not made full disclosure and is aware of the lack of disclosure, the *actus reus* and *mens rea* appear, transforming non-criminal conduct into criminal conduct. It is as if the offence lies dormant, waiting to be brought to germination by the bright light of judicial contemplation.

l'agent est à ce moment-là incertaine et dépendra du fait qu'il n'a pas divulgué «d'une façon appropriée et en temps opportun la source, le montant et la nature du bénéfice», l'autre élément de l'*actus reus*, tout en étant au courant «de l'étendue de la divulgation au commettant ou de l'absence de divulgation», l'autre élément de la *mens rea*. Selon l'analyse du juge Cory, la perpétration d'une partie de l'infraction peut être différée en fonction des circonstances. L'*actus reus* et la *mens rea* nécessaires apparaissent si, au moment que le juge de première instance estime, après coup, «opportun», l'agent n'avait pas fait une divulgation complète et était au courant de cette absence de divulgation, une conduite non criminelle devenant alors une conduite criminelle. C'est un peu comme si l'infraction était latente et ne se concrétiserait que lorsque le tribunal décide qu'elle a été accomplie.

It is a fundamental proposition of the criminal law that the law be certain and definitive. This is essential, given the fact that what is at stake is the potential deprivation of a person of his or her liberty and his or her subjection to the sanction and opprobrium of criminal conviction. This principle has been enshrined in the common law for centuries, encapsulated in the maxim *nullum crimen sine lege, nulla poena sine lege*—there must be no crime or punishment except in accordance with law which is fixed and certain. A crime which offends this fundamental principle may for that reason be unconstitutional. As Lamer J., as he then was, said in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1155:

C'est un concept fondamental du droit pénal que les règles de droit doivent être précises et définitives. C'est là un concept essentiel puisqu'une personne risque d'être privée de sa liberté et de subir la sanction et l'opprobre que jette une déclaration de culpabilité criminelle. Ce principe est inscrit dans la common law depuis des siècles, et formulé dans la maxime *nullum crimen sine lege, nulla poena sine lege*—il ne saurait exister de crimes ou de sanctions sauf en conformité avec des règles de droit bien établies et précises. La création d'un crime qui ne correspond pas à ce principe fondamental pourrait bien de ce fait être inconstitutionnelle. Comme l'a affirmé le juge Lamer, maintenant Juge en chef, dans le *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123, à la p. 1155:

> It would seem to me that since the advent of the *Charter*, the doctrine of vagueness or overbreadth has been the source of attack on laws on two grounds. First, a law that does not give fair notice to a person of the conduct that is contemplated as criminal, is subject to a s. 7 challenge to the extent that such a law may deprive a person of liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Clearly, it seems to me that if a person is placed at risk of being deprived of his liberty when he has not been given fair notice that his conduct falls within the scope of the offence as defined by Parliament, then surely this would offend the principles of

> Il me semble que, depuis l'adoption de la *Charte*, la théorie de l'imprécision ou de la portée excessive d'une loi a été à l'origine de deux moyens de contestation des lois. Premièrement, une loi qui ne donne pas un avertissement suffisant que la conduite envisagée est criminelle peut être contestée en vertu de l'art. 7 dans la mesure où cette loi peut priver une personne de sa liberté et de sa sécurité d'une manière qui n'est pas conforme aux principes de justice fondamentale. Il me semble évident qu'il y a atteinte aux principes de justice fondamentale si une personne risque d'être privée de sa liberté parce qu'elle n'a pas reçu un avertissement suffisant que sa conduite était visée par l'infraction définie

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fundamental justice. Second, where a separate *Charter* right or freedom has been limited by legislation, the doctrine of vagueness or overbreadth may be considered in determining whether the limit is "prescribed by law" within the meaning of s. 1 of the *Charter*.

It is vagueness in the first sense mentioned by Lamer J. which is raised by the "after-the-fact" approach to the determination of when disclosure is timely that is advocated by Cory J.

Dickson C.J., La Forest and Sopinka JJ. concurring, agreed that it would be contrary to the principles of fundamental justice to permit a person to be deprived of his or her liberty for the violation of a vague law. As Dickson C.J. put it (at p. 1141):

> Certainly in the criminal context where a person's liberty is at stake, it is imperative that persons be capable of knowing in advance with a high degree of certainty what conduct is prohibited and what is not. It would be contrary to the basic principles of our legal system to allow individuals to be imprisoned for transgression of a vague law.

A hovering possibility of criminality, which may come into being when in the circumstances it is deemed (after the fact) to have been timely to disclose, offends the fundamental requirement that the criminal law be certain. Simply put, agents will not thereby be given fair notice in advance whether a proposed course of conduct is criminal. Not only is this lack of predictability potentially unfair, it is also calculated to lessen the deterrent effect of the existence of the criminal prohibition, since people may put off disclosure which they ought to make because, as they see the circumstances at the time, no disclosure is necessary. Finally, it raises the question of whether an agent, who, at a certain time ought in all the circumstances to have disclosed a reward, is entitled to be acquitted because he did not realize that it was time to disclose.

In my view, if lack of disclosure is an element of the offence, then the time for disclosure must be clear and certain in law. Rather than holding the offence in suspended animation pending some

par le Parlement. Deuxièmement, lorsqu'une loi restreint une liberté ou un droit distinct garanti par la *Charte*, on peut tenir compte de la théorie de l'imprécision ou de la portée excessive d'une loi pour déterminer si la limite est imposée «par une règle de droit» au sens de l'article premier de la *Charte*.

C'est l'imprécision dans le premier sens mentionné par le juge Lamer que soulève l'analyse «après coup» du moment opportun de la divulgation, que préconise le juge Cory.

Le juge en chef Dickson, avec l'appui des juges La Forest et Sopinka, a convenu qu'il serait contraire aux principes de justice fondamentale de permettre à une personne d'être privée de sa liberté pour avoir violé une règle de droit imprécise. Le juge en chef Dickson affirme, à la p. 1141:

> Il est certain que dans le contexte pénal où la liberté d'une personne est en jeu, il est impératif que les personnes soient en mesure de savoir d'avance avec un degré de certitude élevé quelles conduites sont interdites ou permises. Il serait contraire aux principes fondamentaux de notre système judiciaire d'incarcérer des personnes pour la violation d'une loi imprécise.

Le risque qu'une conduite donnée devienne criminelle si l'on juge (après coup) que, dans les circonstances, le moment était opportun aux fins de la divulgation, va à l'encontre de l'exigence fondamentale que les règles de droit pénal soient précises. Bref, un agent ne recevra pas ainsi un avertissement suffisant que l'acte qu'il se propose d'accomplir est criminel. Cette absence de prévisibilité risque non seulement d'être injuste, mais aussi de limiter l'effet de dissuasion associé à l'existence d'une interdiction criminelle, car une personne pourrait différer la divulgation qu'elle était tenue de faire parce que, dans les circonstances de l'époque, elle n'estimait pas nécessaire de la faire. Enfin, il faut aussi déterminer si un agent tenu de divulguer, à un certain moment, une récompense, quelles que soient les circonstances, a droit à un acquittement parce qu'il ne s'est pas rendu compte que le moment était venu de le faire.

À mon avis, si l'absence de divulgation constitue un élément de l'infraction, le moment de la divulgation doit être clair et précis en droit. Plutôt que d'attendre la réalisation d'un événement futur

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future event which will determine the timeliness of disclosure, I would fix the time at which disclosure must be made. Where the *actus reus* is the taking of a secret commission, then the relevant time to see whether there has been a failure to disclose is the time the commission is taken. For practical purposes, this means that if the agent accepts a commission without beforehand (or simultaneously, if that can be conceived) advising the principal of the fact, the offence is established. It is up to the agent to refuse the commission unless he or she has first advised the principal of his or her intention to take it.

This, in my view, makes practical sense. To allow an agent to accept a secret commission on the basis that he or she will tell the principal "as soon as possible" is to encourage the acceptance of such commissions: the road to crime, as to hell, may be paved with good intentions. On the other hand, to require the agent to clear the matter with his or her principal before accepting the commission imposes no undue hardship. Assume, for example, the arrival in the mail of an unsolicited commission. The agent cannot accept the cash or cash the cheque, as the case may be, until he or she has advised the principal of the commission. I see only good coming from such a requirement.

I turn from the timing of disclosure to the question of degree of disclosure. Here again the governing consideration is that the criminal law must be clear and certain. Cory J. states that the amount of the commission must be stated to the "best of the agent's ability", and concludes (at p. 194):

> If the accused was aware that some disclosure was made then it will be for the court to determine whether, in all the circumstances of the particular case, it was in fact adequate. . . .

This "after-the-fact" standard is, in my opinion, too vague to meet the requirements of the criminal law.

qui servira à déterminer le moment opportun de la divulgation, on devrait, à mon avis, préciser le moment où la divulgation doit être faite. Si l'*actus reus* est l'acceptation d'une commission secrète, alors le moment pertinent qui servira à déterminer s'il y a eu absence de divulgation est celui où la commission est acceptée. En pratique, si l'agent accepte une commission sans en informer le commettant au préalable (ou simultanément à l'acceptation, en admettant que cela soit possible), l'infraction est commise. Il appartient à l'agent de refuser la commission sauf s'il a tout d'abord informé le commettant de son intention de l'accepter.

À mon avis, il est logique de procéder de cette façon. Permettre à un agent d'accepter une commission secrète pour le motif qu'il en divulguera l'existence au commettant «dès que possible» encourage l'acceptation de ces commissions: le «chemin» du crime, tout comme celui de l'enfer, peut être pavé de bonnes intentions. Par contre, exiger de l'agent qu'il obtienne tout d'abord l'accord de son commettant avant d'accepter une commission ne crée aucun préjudice indu. Supposons, par exemple, que l'agent recevrait par courrier une commission non sollicitée. L'agent ne pourra accepter la somme d'argent ou toucher le chèque, selon le cas, tant qu'il n'aura pas informé le commettant de l'existence de la commission. Je suis d'avis qu'une telle exigence ne peut apporter que des résultats positifs.

Je passerai maintenant de l'examen du moment de la divulgation à celui du degré de divulgation. De nouveau, la considération de base est que les règles de droit pénal doivent être claires et précises. Le juge Cory précise que l'agent doit «calcul[er] le mieux possible» le montant de la commission et il conclut, à la p. 194:

> Si l'accusé savait qu'il y a eu divulgation, il reviendra à la cour de déterminer si, compte tenu de toutes les circonstances de l'affaire, elle a été faite de façon appropriée . . .

Selon moi, cette norme appliquée «après coup» est trop imprécise pour satisfaire aux exigences du droit pénal.

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I agree with Cory J. that the extent of disclosure required depends on the purpose which the disclosure requirement is intended to further. I agree with Cory J. as well that "disclosure is essential to alert the principal to the existence of conflict of interest situations" (p. 190). It is to the avoidance of conflicts of interest and the consequent danger that the agent may not act exclusively in the best interests of his or her principals that the disclosure requirement is directed. The amount of the commission is purely secondary. A large commission might tempt one agent; a small one might suffice for another. Moreover, a requirement that the amount of the commission be disclosed poses practical difficulties of calculation, as Cory J. recognizes. These are exacerbated if disclosure is to be made either simultaneously with acceptance of the commission, or, as would be practically necessary under my reasoning, in advance.

In my view, all that is required by the criminal law is that if an agent is contemplating taking a commission from a third party with respect to a transaction with his principal, then the agent must disclose the fact that he will receive the commission to the principal, specifically advising the principal of the transaction to which the commission will relate. Such a communication will put the principal on notice that the agent is in a potential conflict of interest. It will then be open to the principal to decline to enter the transaction, to ask for further details or amounts, or to take such other steps as he or she may choose. The objective of the section will be achieved, and the question as to whether the agent's conduct is criminal will not hang on arguments over whether the agent has made a "reasonable effort" to state the amount of the commission to the "best of [his or her] ability" "in all the circumstances of the particular case". I add that it cannot be enough to state at the beginning of a relationship that commissions may from time to time be taken. The offence relates to a particular taking, and so, it follows, must disclosure.

On the facts of this case it is clear that there was no disclosure of the particular commissions to the

Je suis d'accord avec le juge Cory que l'étendue de la divulgation requise dépend de l'objet que vise à atteindre l'obligation de divulgation. Je conviens également avec lui que «la divulgation de l'existence d'une commission est essentielle pour attirer l'attention du commettant sur les risques de conflits d'intérêts» (p. 190). L'obligation de divulgation vise à éviter les conflits d'intérêts et, donc, le risque que l'agent n'agisse pas exclusivement dans l'intérêt de ses commettants. Le montant de la commission est purement secondaire. Certains agents seront tentés par une commission élevée, mais d'autres le seront par une commission moindre. Par ailleurs, obliger la divulgation du montant d'une commission pose des difficultés pratiques de calcul, comme le reconnaît le juge Cory. Ces problèmes sont amplifiés si la divulgation doit être faite simultanément à l'acceptation de la commission ou, comme l'exigerait à toutes fins pratiques mon raisonnement, à l'avance.

À mon avis, le droit pénal exige tout simplement que l'agent qui a l'intention d'accepter une commission d'un tiers relativement à une opération qu'il a conclue avec son commettant en fasse part à ce dernier, et lui indique précisément sur quelle opération portera la commission. Ainsi informé, le commettant saura que l'agent risque d'être dans une situation de conflit d'intérêts. Il lui appartiendra ensuite de refuser de conclure l'opération en question, de demander d'autres détails ou le montant des commissions, ou de prendre d'autres mesures qu'il peut juger nécessaires. L'objectif de la disposition sera atteint et la question de savoir si la conduite de l'agent est criminelle ne tournera pas autour d'arguments visant à déterminer si l'agent a déployé des «efforts raisonnables» pour indiquer le montant de la commission «calculé le mieux possible» «compte tenu de toutes les circonstances de l'affaire». Je tiens à préciser qu'il ne peut être suffisant de mentionner au début d'une relation qu'il pourra y avoir acceptation de commissions à l'occasion. L'infraction porte sur l'acceptation d'une commission donnée et il doit en être de même de la divulgation.

D'après les faits de l'espèce, il est évident qu'il n'y a eu aucune divulgation des commissions aux

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principals involved. Therefore the offence is made out.

I would dismiss the appeal.

Appeal dismissed, SOPINKA J. *dissenting.*

Solicitors for the appellant: Oreck, Chernoff, Tick, Farber & Folk, Vancouver.

Solicitor for the respondent: The Ministry of the Attorney General, Vancouver.

commettants en cause. En conséquence, il y a eu perpétration de l'infraction.

Je suis d'avis de rejeter le pourvoi.

Pourvoi rejeté, le juge SOPINKA *est dissident.*

Procureurs de l'appelant: Oreck, Chernoff, Tick, Farber & Folk, Vancouver.

Procureur de l'intimée: Le ministère du Procureur général, Vancouver.

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CPR

PUBLIC

Competition Tribunal

Tribunal de la Concurrence

PUBLIC VERSION

Reference: *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15
File no.: CT1998002
Registry document no.: 192b

00 256 007

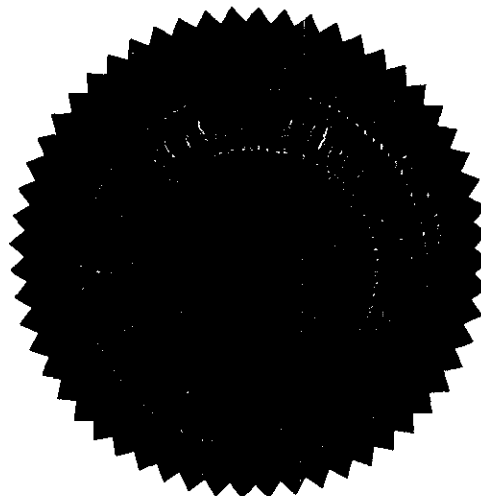
IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/94-290, as amended;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b) of the *Competition Act* relating to the proposed acquisition of ICG Propane Inc. by Superior Propane Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition under section 92 of the *Competition Act.*

BETWEEN:

The Commissioner of Competition
(applicant)



and

Superior Propane Inc.
ICG Propane Inc.
(respondents)

Dates of hearing:	19990923, 24, 27-29; 19991004-08, 13-15, 18-21, 25-29; 19991101-03, 23, 25, 29, 30; 19991201-03, 06-09, 13, 14; 20000119, 24, 31; 20000201-04, 07-09
Members:	Nadon J. (presiding); L.R. Bolton (19990923 to 19991103); C. Lloyd (19991129 to 20000209); and L.P. Schwartz
Date of order:	20000830
Order signed by:	Nadon J.

REASONS AND ORDER

[41] Further, the respondents assert that every year, a substantial number of propane and alternate fuel customers replace their existing equipment or make an initial fuel choice and accordingly choose from among the "entire menu" of fuel choices. The respondents note that customers making an initial fuel choice or replacing existing equipment face no incremental switching costs and, therefore, that customers whose equipment is in mid-life cycle pay the same price as those who are at the end of the cycle.

[42] The respondents argue that propane industry views support the substitutability of alternative fuels. They state as an example that Steven Sparling of Sparling's Propane Company Limited ("Sparling") testified that his company considered any energy provider a competitor. This includes electricity, natural gas, fuel oil and propane marketers.

[43] The respondents also submit that the Tribunal in the context of denying an injunction to the Commissioner in this case (see *Director of Investigation and Research v. Superior Propane Inc.* (1998), 85 C.P.R. (3d) 194 at 207, 208, [1998] C. C. T. D. No. 20 (QL)) acknowledged the statements made by Superior and ICG in their securities filings regarding competition between propane and alternate fuels. At the time, Rothstein J. accepted that they were competing in a wide energy market on the basis that the statements contained in the prospectus and annual reports and in ICG's preliminary prospectus were "of some significance" and something upon which he should "place weight".

[44] The respondents also assert that supply substitution is possible and that the relevant market should take account of firms that can easily switch their facilities to propane marketing. They submit that it is appropriate to include upstream industry participants and industrial gas companies as well as other distributors of alternate fuels.

[45] Finally, the respondents suggest that the analysis conducted by the Commissioner's experts, Professors Ryan and Plourde, explicitly recognizes that alternate fuels and propane are substitutes in various places at various times for various end-uses.

(3) Analysis

[46] There is clearly no commonality in the positions of the parties before the Tribunal on the appropriate definition of the product market. Accordingly, the Tribunal must decide which evidence is the more convincing.

[47] The purpose of defining the relevant product market is to identify the possibility for the exercise of market power. This purpose was clearly asserted in the two previous merger cases heard by the Tribunal. In *Director of Investigation and Research v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 at 177, 178, [1992] C.C.T.D. No. 7 (QL), the Tribunal reiterated:

> The general issues with respect to the definition of a market in a merger case have been set in the *Hillsdown Holdings (Canada) Ltd.* decision, *supra*. The relevant market for purposes of merger analysis is one in which the merging firms acting alone or in concert with other firms could exercise market power. Market

power is the ability of a firm or group of firms to maintain prices above the competitive level. Market power may also be exercised by offering, for example, poor service or quality or by restricting choice. When used in a general context, "price" is thus a shorthand for all aspects of firms' actions that bear on the interest of buyers . . . .

The delineation of the relevant market *is a means to the end of identifying the significant market forces* that constrain or are likely to constrain the merged entity. . . .

The critical issue is to ensure that all factors have been considered that have a bearing on whether there has or is likely to be a prevention or lessening of competition to a substantial degree. (emphasis added)

[48] While market definitions should be as precise as possible within the limit of reasonableness to provide a framework within which competition implications of a transaction can be analysed, the Tribunal should not be preoccupied with market definition to the point of losing sight of the purpose of the exercise under the Act which is to determine whether the merger is likely to lead to a substantial prevention or lessening of competition. As stated by the Supreme Court of Canada in *Director of Investigation and Research v. Southam Inc.*, [1997] 1 S.C.R. 748 at 788:

. . . More generally, I notice that the Tribunal seems to have been preoccupied with the definition of the relevant market. It is possible that the members may occasionally have lost sight of the ultimate inquiry, which is whether the acquisition of the community newspapers by Southam substantially lessened competition.

[49] In the Tribunal's view, the factual and expert evidence on substitutability is very important. The Tribunal distinguishes between "switching" in its common sense meaning and substitutability in the economic sense; it is the latter that is important in delineating a relevant product market. It may be, as the respondents claim, that at the end of the useful life of their heating or other energy-using equipment, consumers do switch to propane from alternate fuels depending, in part at least, on differences in fuel prices. However, this behaviour demonstrates *de novo* choice; at the end of their equipment life cycle, those consumers are in the same position as when they first chose a fuel. This behaviour is not evidence of substitutability, which refers to changing a consumption pattern in response to a price change with all other determinants of change, including the age of equipment, held constant.

[50] Mr. Katz stated that AmeriGas was successful in attracting customers to propane from other fuels before the end of the useful life of their existing equipment. However, he provided no quantitative evidence as to AmeriGas's success in this regard and accordingly, it is difficult for the Tribunal to judge the extent of such success.

[51] Mr. Sparling's testimony is that Sparling is seeking to attract new propane customers in the new housing developments. If Sparling is successful, it is evidence that such customers are

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Competition Tribunal **Tribunal de la Concurrence**

PUBLIC VERSION

Reference: *The Commissioner of Competition v The Toronto Real Estate Board,* 2016 Comp. Trib. 7
File No.: CT-2011-003
Registry Document No.: 385

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Toronto Real Estate Board
(respondent)

and

Canadian Real Estate Association
(intervenor)

Dates of hearing: 20120910 to 20120914, 20120918 to 20120919, 20120924 to 20120925, 20120927 to 20120928, 20121002 to 20121003, 20121009 to 20121010, and 20121017 to 20121018 (Initial hearing); 20150921 to 20150924, 20151005 to 20151007, and 20151102 (Redetermination hearing)
Before: P. Crampton C.J., D. Gascon (Chairperson) and Dr. W. Askanas
Date of reasons and order: April 27, 2016

REASONS FOR ORDER AND ORDER

sufficient direct evidence to demonstrate a range over which the likely future price would have fallen (*CCS* at para 59).

[129] In a proceeding under section 79 of the Act, such direct evidence with respect to the Base Price will often not be available. This is especially so where, as in the present proceeding, the principal allegation is that the impugned conduct is *preventing* competition, or will prevent competition in the future. However, even in a case in which the principal allegation is that the impugned conduct is *lessening* competition, or has already lessened competition, the practical challenges associated with applying the iterative exercise contemplated by the hypothetical monopolist approach may be insurmountable. This is in part because products that may appear to be close substitutes at the prevailing price may not be close substitutes at the Base Price level, i.e., at the price that likely would have prevailed in the absence of the impugned conduct.

[130] Accordingly, it should be recognized that market definition in section 79 proceedings will largely involve assessing indirect evidence of substitutability, including factors such as functional interchangeability in end-use; switching costs; the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; physical and technical characteristics; and price relationships and relative price levels (*Canada Pipe FCA Cross Appeal* at paras 15-16; *Tele-Direct* at pp. 36-82). In assessing such indirect evidence, functional interchangeability in end-use is a necessary but not sufficient condition for products to be included in the same relevant market (*Tele-Direct* at p. 38).

[131] In the geographic context, transportation costs and shipment patterns, including across Canada's borders, should also be assessed.

[132] In carrying out such assessments of indirect indicia of substitutability, it should be recognized that it will often neither be possible nor necessary to define the product and geographic dimensions of the relevant market(s) with precision. However, an assessment must ultimately be made (at the paragraph 79(1)(*c*) stage of the analysis) of the extent to which products and supply locations that have not been included in the relevant market provide or would likely provide competition to the products and locations that have been included in the market (*CCS* at paras 59-60 and 92; *Director of Investigation and Research v NutraSweet Co* (1990), 32 CPR (3d) 1 (Comp. Trib.) (***"NutraSweet"***) at p. 20).

(2) The product dimension

[133] The Commissioner submits that the product dimension of the relevant market is the supply of residential real estate brokerage services that provide MLS accessibility.

[134] In his 2012 written closing submissions, the Commissioner recognized that sellers of homes require different services than purchasers of homes and that therefore, from a demand-side perspective, it might be more appropriate to define distinct relevant markets consisting of each of those distinct categories of purchasers of real estate brokerage services. This was also the position advanced by Dr. Vistnes.

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Canada (Commissioner of Competition) v. CCS Corp., [2012] C.C.T.D. No. 14

Canada Competition Tribunal Decisions

Canada Competition Tribunal

Ottawa, Ontario

Panel: S. Simpson J. (Chairperson), P. Crampton C.J. and Dr. W. Askanas

Heard: November 16-18, 22-25, 29-30 and December 1-2, 13-14, 2011.

Decision: May 29, 2012.

File No.: CT-2011-002

Registry Document No.: 189

[2012] C.C.T.D. No. 14 | *[2012] D.T.C.C. no 14* | *2012 Comp. Trib. 14*

Reasons for Order and Order IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended; AND IN THE MATTER OF an Application by the Commissioner of Competition for an Order pursuant to section 92 of the Competition Act; AND IN THE MATTER OF the acquisition by CCS Corporation of Complete Environmental Inc. Between The Commissioner of Competition (applicant), and CCS Corporation, Complete Environmental Inc., Babkirk Land Services Inc., Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey (respondents)

(409 paras.)

Case Summary

Commercial law — Competition — Restrictive trade practices — Mergers — Powers of Competition Tribunal — Factors to be considered — Barriers to entry — Whether effective competition will remain — Removal of a competitor — Order in respect of completed merger — Application by Competition Commissioner for order pursuant to s. 92 of Competition Act allowed — CCS purchased shares of Complete Environmental, acquiring Babkirk Land Services facility — Commissioner alleged prevention of competition between secure landfills taking hazardous solid waste — Despite likely un-profitability of bioremediation processing, Babkirk facility would have operated in meaningful competition with a CCS secure landfill site in area until spring 2013 — Efficiencies claimed by CCS did not satisfy s. 96 of Act, as meaningful competition would have reduced tipping fees by 10 per cent — Least intrusive remedy was order for divesture of shares — Competition Act, ss. 2(1), 91, 92, 96.

Application by the Commissioner of Competition for an order pursuant to s. 92 of the Competition Act. CCS was a private energy and environmental waste management company that served oil and gas producers in Western Canada. It owned the only two secure landfills in North-Eastern British Columbia permitted to accept solid hazardous waste. Babkirk Land Services (BLS) operated a facility with a permit for treatment and short-term storage of hazardous waste. The facility stopped accepting waste and steps were taken to obtain permits for construction of a secure landfill capable of accepting solid, hazardous waste at the Babkirk site. In 2009, Complete Environmental was created to acquire the shares of BLS from its original principals. Complete Environmental operated other landfill and solid waste business interests. In February 2010, BLS received a permit authorizing construction of a secure landfill, but had not commenced operations. In January 2011, CCS

ISSUE 2 **WHAT IS THE PRODUCT DIMENSION OF THE RELEVANT MARKET?**

The Analysis

58 In defining relevant markets, the Tribunal generally follows the hypothetical monopolist approach. As noted in *Commissioner of Competition v. Superior Propane,* 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385 (Comp. Trib.) ("*Propane 1*"), at para. 57, the Tribunal embraces the description of that approach set forth at paragraph 4.3 in the Commissioner's Merger Enforcement Guidelines ("MEGs"), which state:

> Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP") above levels that would likely exist in the absence of the merger.

59 The price that would likely have existed in the absence of or "but for" the merger in a "prevent case" is the Base Price. The burden is on the Commissioner to demonstrate the "Base Price". In this case, Dr. Baye has predicted a decrease in Tipping Fees in the absence of the Merger of at least 10% and in some of his economic modelling the price decrease is as large as 21%. In *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.,* 2001 Comp. Trib. 3; 11 C.P.R. (4th) 425; aff'd 2003 FCA 131, at para. 92, the Tribunal observed that, when a price change can be predicted with confidence, it is appropriate to delineate markets based on the likely future price even if the future level of that price cannot be predicted precisely. In such cases, it may be sufficient for the Commissioner to demonstrate a range in which the likely future price would have fallen.

60 However, if a reasonable approximation of the likely future price cannot be demonstrated, it may be difficult for the Tribunal to clearly define the boundaries of the relevant market. In such cases, it will nevertheless be helpful for the Tribunal to be provided with sufficient evidence to demonstrate why substitutes that appear to be acceptable at the prevailing price level would or would not remain acceptable at price levels that would likely exist "but for" the merger or anti-competitive practice in question. In any event, evidence about various practical indicia is typically required to apply the hypothetical monopolist approach. The Tribunal recognizes that, like other approaches to market definition, the hypothetical monopolist approach is susceptible to being somewhat subjective in its practical application, in the absence of some indication of what constitutes a "small but significant and non-transitory increase in price" (SSNIP). For this reason, objective benchmarks such as a five percent price increase lasting one year, can be helpful in circumscribing and focusing the inquiry.

61 In the Application at paragraph 11, the Commissioner alleged that "[t]he anti-competitive effects of the Merger "primarily" affect oil and gas companies disposing of Hazardous Waste produced at oil and gas fields within NEBC." [our emphasis]. However, in his initial report Dr. Baye did not limit the product market to Hazardous Waste produced at oil and gas fields. Nevertheless, during the hearing, Dr. Baye and Dr. Kahwaty essentially agreed that the amount of solid hazardous waste generated by non-oil and gas sources and tipped at Secure Landfills in British Columbia is so small that it does not warrant consideration in these proceedings. Accordingly, in the Tribunal's view, the Commissioner's product market definition is "solid hazardous waste generated by oil and gas producers and tipped into secure landfills in NEBC".

62 However, the Respondents deny that the product market is as narrow as the Commissioner suggests. They say that it also includes bioremediation and the storage or risk management of waste on the sites where the waste was generated. They assert that these options constrain any market power that CCS may have. We will deal with these positions in turn.

Evidence about the Use of Bioremediation

63 Bioremediation has been described above and the evidence is clear that it is not an acceptable substitute for generators of Hazardous Waste if soil is contaminated with salts or metals. The Tribunal also accepts that, if heavy-end hydrocarbons are present, bioremediation is not cost effective or successful in a reasonable timeframe.

evidence to suggest that the tenure payments or the cost to obtain a certificate of restoration have any impact on Tipping Fees at Silverberry.

91 Because bioremediation is not cost effective and is slow for a substantial volume of contaminated soil in NEBC and because it does not work at all on salts and metals, the Tribunal is satisfied that a substantial number of generators do not consider bioremediation to be a good substitute for the disposal of such Hazardous Waste in a Secure Landfill and would not likely switch to bioremediation in response to a SSNIP. Accordingly, the Tribunal is satisfied that the relevant product is "solid hazardous waste generated by oil and gas producers and tipped into secure landfills in NEBC".

ISSUE 3 WHAT IS THE GEOGRAPHIC DIMENSION OF THE RELEVANT MARKET?

92 The Tribunal and the courts have traditionally considered it necessary to define a relevant market before proceeding to assess the competitive effects of mergers under the Act. (See, for example, *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.* *(1992), 41 C.P.R. (3d) 289*, at 297; *Canada (Director of Investigation and Research) v. Southam Inc*, *[1997] 1 S.C.R. 748*, at para. 79). However, they have cautioned against losing sight of the ultimate inquiry, which is whether the merger being assessed prevents or lessens, or is likely to prevent or lessen, competition substantially. (*Southam*, above; "*Propane 1*", above, at para. 48). With this admonition in mind, it is the Tribunal's view that, in this case, the Tribunal may evaluate the competitive effects of the Merger without precisely defining the relevant geographic market.

93 This conclusion is important because, as will be discussed below, the evidence that has been adduced does not permit the Tribunal to delineate the exact boundaries of the geographic market.

94 The Tribunal agrees with the approach taken in the MEGs. The process begins with a small area around one of the merging parties' locations (in this case, a Secure Landfill site) and then asks whether all rivals operating at locations in that area, if acting as a hypothetical monopolist, would have the ability and incentive to impose a small but significant price increase (typically 5%) and sustain that increase for a non-transitory period of time (typically one year). If the postulated price increase would likely cause purchasers of the relevant product in that area to switch sufficient quantities of their purchases to suppliers located outside that area to render the price increase unprofitable, then the geographic dimension of the relevant market would be progressively expanded until the point at which a seller of the relevant product, if acting as a hypothetical monopolist, would have the ability and incentive to impose a SSNIP.

95 In the case at bar, the evidence dealt with three geographic regions:

I. **The Contestable Area** - this was identified by Dr. Kahwaty on behalf of CCS.

II. **All of NEBC** - the Commissioner, supported by her expert Dr. Baye, submitted this definition of the geographic market.

III. **The Babkirk Polygon** - this area was identified in internal CCS documents dealing with the potential impact of the Babkirk Facility on CCS.

I. The Contestable Area

96 In broad terms, the Contestable Area identified by Dr. Kahwaty encompasses an hourglass shaped area of 11,000 square kilometres which lies between the Babkirk Site and Silverberry. In his analysis, the road network in this area is such that there are some areas in which both Silverberry and a potential landfill at the Babkirk Site may be viable disposal options for customers with well sites in those areas. Dr. Kahwaty acknowledges that the transportation costs required to reach Silverberry or the Babkirk Site are such that both may be economic

374 Competition may be said to be *prevented* when future competition is hindered or impeded from developing. Common examples of such prevention of competition in the merger context include (i) the acquisition of a potential or recent entrant that was likely to expand or to become a meaningful competitor in the relevant market, (ii) an acquisition of an incumbent firm by a potential entrant that otherwise likely would have entered the relevant market *de novo*, and (iii) an acquisition that prevents what otherwise would have been the likely emergence of an important source of competition from an existing or future rival.

375 In determining whether a prevention or lessening of competition is likely to be *substantial*, the Tribunal typically will assess the likely magnitude, scope and duration of any adverse effects on prices or on non-price levels of competition that it may find are likely to result from the creation, enhancement or maintenance of the merged entity's market power. That is to say, the Tribunal assesses the likely degree of such price and non-price effects, the extent of sales within the relevant market in respect of which such effects are likely to be manifested, and the period of time over which such effects are likely to be sustained.

376 With respect to magnitude or degree, the Tribunal has previously defined substantiality in terms of whether customers are "likely to be faced with *significantly* higher prices or *significantly* less choice over a *significant* period of time than they would be likely to experience in the absence of the acquisitions" (*Southam,* above, at 285, emphasis added). However, given that the Tribunal has now embraced the hypothetical monopolist framework and the SSNIP test for market definition, it is necessary to revisit this definition of substantiality. This is because if the degree of market power used to define relevant markets is the same as the degree of market power used to assess competitive effects, a merger would not be found to be likely to prevent or lessen competition substantially unless the degree of new, enhanced or maintained market power of the merged entity is the same degree of market power held by as the hypothetical monopolist that was conceptualized for the purposes of market definition.

377 Accordingly, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downwards. That recalibrated degree of market power is a level of market power required to maintain prices *materially* higher, or to depress one or more forms of non-price competition to a level that is *materially* lower, than they likely would be in the absence of the merger. As a practical matter, in the case at bar, this distinction between "material" and "significant" is of little significance, because the Panel has found that prices are likely to be significantly (i.e., at least 10%) higher than they would likely have been in the absence of the Merger.

378 Turning to the scope dimension of "substantiality", the Tribunal will assess whether the merged entity, acting alone or interdependently with other firms, likely would have the ability to impose the above-mentioned effects in a material part of the relevant market, or in a respect of a material volume of sales.

379 With respect to the duration dimension of "substantiality", the Tribunal typically will assess whether the merged entity, acting alone or interdependently with other firms, likely would have the ability to sustain the above-mentioned effects for approximately two years or more, relative to the "but for" scenario. This explains why the Tribunal typically assesses future entry and the expansion of potential rivals to the merged entity by reference to a benchmark of approximately two years.

380 When, as in this case, the merger has already occurred and the Commissioner alleges that the merger is likely to prevent competition substantially, the Tribunal's assessment of the duration dimension of "substantiality" will focus on two things. First, the Tribunal will assess whether the entry or expansion that was prevented or forestalled by the merger likely would have been sufficiently timely, and on a sufficient scale, to have resulted in a material reduction of prices, or a material increase in one or more non-price dimensions of competition, had the merger not occurred. If so, the Tribunal will assess whether the entry or expansion of third parties likely will achieve this result, notwithstanding the fact that the merger has occurred.

381 Before assessing whether a likely prevention of future competition would be "substantial," the Tribunal also will assess whether that future competition likely would have materialized "but for" the merger in question. In this