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Fasken Martineau DuMoulin LLP

Decoding of Encrypted Satellite Signals: Radiocommunication Act Provisions Violate Charter

On October 28, 2004, the Court of Québec (Criminal & Penal Division) issued a significant decision in *R. v. D'Argy*¹, in which the Honourable Justice Danielle Côté found the provisions of the *Radiocommunication Act*² (the "Act") that make it illegal for Canadians to receive and decode encrypted U.S. satellite television signals to be unconstitutional as an unreasonable infringement on the right to freedom of expression. Given the potential impact of the decision on the Canadian broadcasting system, we have prepared the following high level summary of this 100-page plus ruling, written almost exclusively in the French language.

Background

The co-accused, Jacques D'Argy and Richard Thériault, were charged in December, 1998 with selling (and using) DIRECTV satellite receivers in order to receive and decode encrypted U.S. television signals. Canadian authorities were charging Canadians for violating the ban on selling or employing devices to decode encrypted signals without authorization pursuant to paragraphs 9(1)(c) and 10(1)(b) of the Act, which provide as follows:

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.

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¹ [2004] J.Q. no 11142.

² R.S.C. 1985, c. R-2.

Justice Côté originally acquitted the co-accused in September, 2000 on the basis of her conclusion that the above-referenced provisions only applied to the unauthorized decoding of signals from licensed Canadian distributors. In June, 2001, the Superior Court rejected the Crown's appeal and affirmed Justice Côté's September, 2000 decision.

A further appeal was taken to the Québec Court of Appeal. One of the questions before the Court of Appeal was whether the prohibition contained in paragraph 9(1)(c) bars the unauthorized decoding of all encrypted satellite signals (regardless of origin), or whether it bars only the unauthorized decoding of signals that emanate from licensed Canadian distributors. A decision in the case was suspended since the very question at issue was then pending before the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*.³

Following the April, 2002 decision of the Supreme Court in *Bell ExpressVu*, which concluded that the Act does prohibit anyone from decoding a signal originating from anywhere in the world (unless authorized by a duly licensed person under Canadian law to transmit and decode such signal, *i.e.*, a distributor holding a licence), the Court of Appeal overturned the acquittals of the co-accused and sent the case back to the Court of Québec so it could consider other defences, including the alleged violation of freedom of expression as guaranteed in subsection 2(b) of the *Canadian Charter of Rights and Freedoms* (the "Charter").

Therefore, the main issue that was addressed during the second proceeding before the Court of Québec was whether paragraphs 9(1)(c) and 10(1)(b) of the Act violated the co-accused's freedom of expression as guaranteed by subsection 2(b) of the Charter and if so, whether such provisions could nonetheless be justified under section 1 of the Charter, which provides that the rights and freedoms set out in the Charter are guaranteed, subject only to such reasonable limits prescribed by law

as can be demonstrably justified in a free and democratic society.

The Facts

The co-accused had been selling (and using) home satellite receiver systems that allowed users to receive and decode U.S. satellite television signals, and more precisely, the signals originating from the U.S. distributor DIRECTV. The co-accused admitted to having sold (and used) the devices without any intention of paying applicable royalties to DIRECTV, but argued that the provisions under which they were charged were unconstitutional.

The co-accused asserted a general right to possess a receiver and a "smart" card allowing for the decoding of satellite television signals of U.S. distributors in consideration of payment of royalties to the distributor (the so-called "grey market"). In addition, the co-accused alleged that they had no criminal intent and therefore that they could not be found guilty — a defence that was invoked in *The Queen v. Love*.⁴ Justice Côté drew a clear distinction between the situation in *Love* and the current circumstances. In *Love*, the accused were operating in the "grey market", while the co-accused in the present situation were operating in the "black market". It was asserted that while the black market, which consists of stealing satellite signals, was clearly illegal and should not receive the protection of the Charter, the grey market, which involves subscribing to a U.S. service by providing a fictitious U.S. address, *but still paying for that service*, could merit a different treatment under the Act and the Charter. Based on that distinction and on the fact that no evidence was introduced to the Court in support of the absence of criminal intent on the part of the co-accused, Justice Côté refused to consider the defence put forth in *Love*.

³ [2002] 2 S.C.R. 559 [hereinafter *Bell ExpressVu*].

⁴ Manitoba Provincial Court, November 6, 2003 [hereinafter *Love*].

Considering the foregoing, the Court concluded that the co-accused were guilty, unless the above-referenced provisions of the Act were found to infringe subsection 2(b) of the Charter and such infringement could not be justified under section 1 of the Charter.

The Charter Argument

In their defence, the co-accused claimed the right to receive all expressive content available on the market, notwithstanding the origin of the satellite signals or the ownership structure of the satellite television distributors.

As a factual basis for their submission, the co-accused noted that some of the channels that they could receive using their systems were not otherwise available in Canada through lawful distributors. According to the co-accused, the mere fact that one channel available through their home satellite systems was not otherwise available on the Canadian market was sufficient to support the argument that their freedom of expression had been violated.

The Crown argued that the co-accused could not benefit from such defence on the basis that they were actually before the Court for participating in the black market, *i.e.*, stealing DIRECTV's signal, rather than simply attempting to receive such signal through a paid subscription in the grey market by falsely claiming to be U.S. residents.

The Court rejected the Crown's argument since the Act's prohibition against decoding signals (except with the authorization of a lawful Canadian distributor) applies equally to both the grey and black markets. Considering the interpretation given by the Supreme Court in *Bell ExpressVu*, Justice Côté concluded that a person participating in the grey market could be charged under the same provisions as an individual engaged in black market activities. In light of the foregoing, the Court determined that the co-accused could invoke the alleged constitutional violation of freedom of expression on the basis of the "grey market" argument, even though they themselves were participating in the black market. In other words, if the challenged provisions were

unconstitutional (having regard to the grey market example), they could not stand and it did not matter what facts gave rise to the charges in this particular case.

(a) Freedom of Expression Analysis

The Court began its analysis of subsection 2(b) of the Charter by noting that the right to receive information was an essential component of freedom of expression. Justice Côté agreed with the Crown's contention that the right to receive information was subject to the rights of the author of the information and that a person having no right to receive such information could not take the position that they had an independent right to receive that information. Rather, any such right was conditional on the author's authorization. However, the Court added that the decision of the author not to authorize a communication had to be exercised through the author's free will, and not as the consequence of a policy preventing the author from disseminating its message to whomever it so chooses. The Court considered that throughout the grey market, DIRECTV (unknowingly) authorized Canadian viewers to decode its signal following false representations as to U.S. residency. According to Justice Côté, despite the fact that such authorization flowed from false representations, the situation was a direct consequence of Canadian broadcasting policies concerning Canadian ownership of broadcasting businesses and the necessity for distributors to receive authorization from the Canadian Radio-television and Telecommunications Commission (the "CRTC"). In that respect, the Court relied on the testimony of a representative from DIRECTV in which the latter stated that, but for Canadian legislation, DIRECTV might decide to offer subscriptions to Canadian residents, a business decision that would be made in consideration of market demand and other regulatory constraints. Thus, Justice Côté concluded that Canadian viewers' right to receive DIRECTV's signal could not be restricted on the basis that DIRECTV did not authorize the reception and decoding of its signal, since the absence of any such authorization is solely dictated by Canadian broadcasting policies.

As for the black market, the Court clearly agreed that the asserted “right” to receive and decode signals without payment did not engage the freedom of expression guarantee since, in such cases, the party transmitting the signal does not authorize the theft of its signal. According to the Court, however, the analysis is different when applied to the grey market. False representations as to residency were not made in order to obtain the signal from DIRECTV without payment — they were made because of the prohibition against decoding such signals in Canada.

Justice Côté next examined whether the grey market decoding activities under consideration fell within the scope of freedom of expression, as recognized by the Supreme Court of Canada. Justice Côté reiterated that the impugned provisions not only prohibited the theft of signals, but also the decoding of such signals in spite of the “authorization” of a foreign distributor. In that regard, the Court observed that the right to transmit a message has as a corollary right, *i.e.*, the right to receive the message — the two rights being inextricably intertwined. Therefore, the act of decoding signals could be viewed as a means of exercising the right to receive communication of a message and would accordingly benefit from Charter protection.

The Crown also challenged the Charter defence on the basis that freedom of expression did not impose an obligation on the Government to provide a certain podium or service for persons entitled to that freedom. According to Justice Côté, however, ever since the decision of the Supreme Court in *Committee for the Commonwealth of Canada v. Canada*⁵, radio frequencies are regarded as public goods and can be used to transmit or receive a message. Therefore, any limitation placed on the use of such frequencies must be analyzed under section 1 of the Charter.

The Court then considered the objective and the effect of the challenged provisions as to their possible violation of

freedom of expression. Justice Côté found that the aim of the absolute prohibition against decoding signals (save with the authorization of a licensed Canadian distributor) was to control the content of television programming throughout Canada and not only to prevent the decoding of signals. It was held that the impugned provisions were concerned with the content of the communication, rather than with the means of communication. For that reason, the intended purpose of the impugned provisions of the Act violated freedom of expression. In any event, the Court concluded that even if the purpose of those provisions did not violate freedom of expression, the effect of the prohibition did offend the right to freedom of expression since Canadian citizens would be deprived of legal access to certain signals, even where they are willing to pay the applicable royalties to access them.

As to the Crown’s argument that the co-accused were challenging the principle of broadcasting regulation itself, the Court was of the opinion that the existence of such principle and its merits had to be studied in light of section 1 of the Charter. Since Mr. D’Argy’s testimony established that he could not obtain the same programming that he could obtain if he were a DIRECTV subscriber, the Court decided that the effect of the impugned provisions violated his freedom of expression.

(b) Section 1 Analysis

In the final and lengthiest portion of her judgment, Justice Côté examined the reasonableness of the violation of freedom of expression under section 1 of the Charter. The Court began this portion of its analysis by reviewing the history of the challenged provisions, after which it summarized the testimonies of about ten witnesses from the broadcasting industry, all of whom explained the functioning of such industry.

⁵ [1991] 1 S.C.R. 139.

The Court analyzed the reasonableness of the violation in conformity with the section 1 criteria elaborated in *R. v. Oakes*⁶ and later refined by subsequent judgments.

Justice Côté considered the context in which paragraph 9(1)(c) of the Act was adopted. The Court explained that the provision resulted from a long and complex legislative evolution, the goal of which was to protect the Canadian content of the Canadian broadcasting system.

The Court adopted the view that the primary target for enforcement of the prohibition against decoding encrypted signals was commercial entities receiving the signals for distribution purposes, and not individuals who gain access to the signals at home for personal use.

After examining the context of their adoption, the Court drew a conclusion as to the objective of the impugned provisions, namely, the protection of the integrity of the Canadian broadcasting system by ensuring that all players using Canadian radio frequencies respect the applicable Canadian regulations, the essential elements of which are: Canadian property, Canadian production and Canadian content. Justice Côté also noted that another objective of those provisions was to guarantee a complete protection to copyright holders.

Based on those premises, the Court undertook an examination of whether the objectives were sufficiently important to justify a restraint on freedom of expression, a question which the Court answered in the affirmative.

The Court also decided that there was a rational connection between the impugned provisions and the above-noted objectives.

The Court then examined whether the impugned provisions impaired freedom of expression only to the extent minimally necessary in order to accomplish the above-mentioned objectives. The Court recognized that in order to protect Canada from a foreign cultural invasion,

the Government had to control the entry into Canada of foreign programs, but enquired whether in order to do so it was necessary not only to prohibit, but also criminalize all decoding activities.

The Court concluded that the Government had never considered that question. Also stressed was the fact that the Government, when enacting the prohibition on decoding encrypted signals without authorization, neglected the question of foreign language channels. The Court deemed this last point as being key, observing that ethnic communities are deprived of many channels in their mother tongues and can be subject to penal sanctions if they try to access them through the grey market. In the Court's assessment, the fact that no alternative measures had been considered by the Government to allow ethnic communities to receive programming in their own languages was critical.

Furthermore, the Court noted that the Government did not submit any evidence to show that no less intrusive prohibition could have been enacted. The fact that the Government did not substantiate that a ban on grey market activities in respect of individuals was necessary to meet the objectives set forth in Canadian broadcasting policy, or that it was necessary to impose penal sanctions on individuals, seems to have reassured the Court in reaching its conclusions. The fact that honest people are prepared to violate the law in order to access, on payment of the relevant royalties, television channels being broadcast in their own languages was clear evidence, according to the Court, that their freedom of expression was detrimentally affected by the impugned provisions of the Act.

Interestingly, the Court also observed that the limitation on available programming resulted, at least in part, from decisions taken by the CRTC rather than from a rule of law.

Since the Government had not proven that the impugned provisions impaired freedom of expression only to the degree minimally necessary to accomplish the objectives

⁶ [1986] 1 S.C.R. 103.

of the Act, such provisions could not be justified in a free and democratic society.

As a result, the Court decided that it was not necessary to determine whether the disputed provisions had a disproportionate effect on the persons to whom they applied. However, the Court noted that since the prohibition extended to citizens who wished to participate only in the grey market, particularly those simply wishing to access ethnic programming, the prohibition seemed to have such a disproportionate effect.

Having found a violation of freedom of expression and concluding that such violation could not be reasonably justified, the Court declared paragraphs 9(1)(c) and 10(1)(b) of the Act inoperative by applying section 52 of the *Constitution Act, 1982*. The Court granted a grace period of one year from the date of the judgment before the ruling comes into effect, thus giving the Government time to modify the impugned provisions and render the Act constitutionally sound. However, the Court decided that the suspension would not apply to the co-accused who were accordingly acquitted.

It is worth noting that the request of the co-accused to require the Attorney General of Canada to pay their legal fees was denied by the Court on the basis that the finding of invalidity was based upon factual scenarios arising in the context of grey market activities (the co-accused having been participants in the black market).

Conclusion

Justice Côté's judgment is certainly interesting and will undoubtedly ignite a lively debate among industry stakeholders.⁷ Considering the importance of the decision for the communications industry generally, and

broadcasting in Canada in particular, it is not surprising that the Crown opted on November 24, 2004 to appeal last month's controversial ruling to the Québec Superior Court. The grounds for appeal are listed over twelve paragraphs and include the following:

- the Court erred in considering that there was a factual basis for freedom of expression arguments;
- the Court erred in concluding that grey market activities are protected by freedom of expression;
- the Court erred in taking for granted that, but for existing Canadian broadcasting policy, DIRECTV signals would be destined to the general public in Canada;
- the Court erred in taking for granted that DIRECTV could authorize reception of its signal in Canada in spite of not being an authorized distributor in Canada;
- the Court erred in failing to consider the constitutional rights of legitimate distributors;
- the Court erred in attacking the general scheme of broadcasting and radiocommunication policy in Canada;
- the Court erred in analyzing the evidence as to the purpose of paragraph 9(1)(c) of the Act;
- the Court erred in placing the burden on the Crown to demonstrate the reasonableness of Canadian broadcasting policy;
- the Court erred in concluding that paragraphs 9(1)(c) and 10(1)(b) of the Act did not constitute reasonable limits on the right to freedom of expression which could be demonstrably justified under section 1 of the Charter; and
- the Court erred in failing to restrict its finding of invalidity only to cases caught by the prohibition contained in paragraph 9(1)(c).

⁷ Justice Côté is no stranger to controversial rulings. In 1999, she struck down the requirement in Québec that French be predominant on commercial signs, arguing that the government failed to show that the limits on freedom of expression were warranted. That ruling, however, was later overturned on appeal.

In its Notice of Appeal to the Superior Court, the Crown has requested that the acquittals of the co-accused be overturned and substituted for findings of guilt.

Regardless of who wins the immediate appeal, this case may ultimately reach the Supreme Court of Canada, giving that Court the opportunity to complete its examination of the legal scheme undertaken in *Bell ExpressVu* and allowing it to answer the question it had expressly left open as to the constitutionality of certain provisions of the Act.⁸

⁸ Following the Supreme Court's decision in *Bell ExpressVu*, the Government has twice moved to reform the Act with a view to preventing the theft of satellite signals and the paid reception of foreign satellite signals that have not been authorized for viewing in Canada by: (i) explicitly prohibiting the importation of decoding equipment used to pick-up satellite signals illegally; (ii) significantly increasing the penalties for these offences to serve as a greater deterrent; and (iii) enhancing the rights of the Canadian broadcasting industry to recover damages from those who sell illegal equipment and services. However, the most recent amendment package — Bill C-2, *An Act to amend the Radiocommunication Act* — died on the *Order Paper* when the last federal election was called. It will be interesting to see whether the current Government moves to reintroduce amendments to the Act, or whether it will postpone any such decision until the present Charter challenge and related appeal(s) have been fully resolved.

For further information on the subject of this article, please contact the authors:

Barbara Miller

416 865 4410
bmiller@tor.fasken.com

Jean-François Hébert

418 640 2024
jhebert@qc.fasken.com

Jamie Pennell

416 868 3509
jpennell@tor.fasken.com

Mathieu Leblanc-Gagnon

418 640 2036
mleblancgagnon@qc.fasken.com

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Vancouver

604 631 3131
info@van.fasken.com

Québec City

418 640 2000
info@qc.fasken.com

Calgary

403 261 5350
info@cgy.fasken.com

New York

212 935 32 03
info@nyc.fasken.com

Toronto

416 366 8381
info@tor.fasken.com

London

44 20 7929 2894
info@lon.fasken.com

Montréal

514 397 7400
info@mtl.fasken.com

Johannesburg

27 11 685 0800
info@jnb.fasken.com