Recent Case Law from the Supreme Court of Canada in the area of Commercial Law

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OSLER

The Year in Review

- Supreme Court Case Law in 2016 demonstrates there is healthy discussion on the Court on issues of importance to commercial law.
- 3 out of 8 cases we will review have dissents, of which two were written by Justice Côté (and she concurred in the third dissent).
- Oft cited reason for dissent: the majority reasoning fails to take into account commercial reality.
- Court was unanimous in supporting strong protection of privilege in three cases involving statutory powers or orders to turn over documents to a regulatory or governmental authority.

Some Topics Discussed by the SCC in 2016

- Standard of review for standard form contracts;
- Privilege in the context of statutory powers and orders to produce documents;
- Use of the oppression remedy among shareholders;
- Division of powers in the telecommunications sector;
- The ability to offer discounts on mortgage interest rates; and
- Dismissal without cause under the Canada Labour Code

Standard of Review – Standard form Contracts

Overview - Facts

- At issue was an exclusion clause common to all-risk property insurance policies, which typically is issued to the general contractor and covers physical damage on a construction, including by the general contractor's sub-contractors.
- The exclusion provided that "the cost of making good faulty-workmanship" was not covered by the policy.
- In addition, there was a carve-out to the exclusion in that "physical damage" resulting from the faulty workmanship was nonetheless covered.
- Here, a window-cleaning subcontractor had damaged the windows of the entire building while cleaning. The question was whether the policy covered (i) the cost of re-cleaning the windows, and (ii) the cost of replacing the windows.

Overview - Holding

- The Court concluded that the interpretation of standard form contracts is a question of law.
- Accordingly, the appropriate standard of review of a judicial decision interpreting a standard form contract is correctness.
- Here, only the cost of re-cleaning the windows, i.e. the faulty workmanship, is excluded from coverage.
- The Court finds this interpretation best represents the parties' reasonable expectations, as informed by the purpose of builders' risk policies, and in this way aligns with commercial reality and jurisprudence interpreting similar exclusions.

Takeaways

- Given this new standard of review for all standard form contracts, the risk of appeal court revision for many commercial contracts, if not most, has been significantly increased with *Ledcor*.
- Parties who regularly use standard contracts should be weary of ensuring their standard clauses are not ambiguous and therefore, open to interpretation.
- The Court did specify, however, that where there is evidence that the contract was in fact negotiated, the standard of correctness will not apply.

PRIVILEGE

Facts

- A former employee of the University of Calgary ("**U of C**") sued the University for constructive dismissal.
- She made an access request under s. 7 of the *Freedom of Information and Protection of Privacy Act* (Alberta) (FOIPP) for all records concerning her in the University's possession.
- U of C refused to produce certain documents asserting solicitor-client privilege.
- The Office of the Information and Privacy Commissioner of Alberta ("**OIPC**") ordered U of C, pursuant to its statutory power to order the production of documents at s. 56(3) FOIPP, which reads that production may be ordered despite: "any privilege of the law of evidence", to produce the privileged records so that it could review whether the privilege was appropriately asserted.

Main Issue and Decision

- Does s. 56(3) FOIPP require a public body to produce records over which SCP is claimed to the Commissioner?

  Decision: No

Reasons of the Majority

Interpretation of s. 56 (3) FOIPP

- The phrase « despite any privilege of the law of evidence » in s. 56(3) FOIPP is not precise enough to capture SCP.
- SCP is not just an evidentiary privilege, it is a substantive privilege with quasi-constitutional status. « Privilege of the law of evidence » must be understood to refer to privileges that are only evidentiary, such as spousal communication privilege, religious communication privilege and privilege over settlement discussions.
- Referencing its decision in *Blood Tribe* (2008 SCC 44), the Court recalls that SCP is a fundamental and substantive right in the legal system having quasi-constitutional status, therefore, legislative language purporting to abrogate it, set it aside, or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent.
- SCP cannot be set aside by inference.

Reasons of the Majority (cont'd)

Factors supporting the chosen interpretation

- No safeguards are included in the statute to ensure that disclosure to the Commissioner does not compromise the substantive right of SCP.
- The Commissioner is not a neutral adjudicator, it may take a public body to court for refusal to disclose information.

Facts

- Section 231.2 of the *Income Tax Act* ("**ITA**") allows the Canada Revenue Agency ("**CRA**") to compel the production of documents.
- The provision contains a carve-out for documents subject to SCP, however, the definition of this privilege under the ITA itself carves out lawyers' accounting records. Therefore, these records may be compelled by the CRA.
- Under Section 231.7, where a person to whom a requirement to produce documents is issued refuses to turn over documents, the Minister may institute summary proceedings to obtain an order from a judge to compel the production of the records, which the judge must do if satisfied that the person was required to do so pursuant to the terms of s. 231.2 ITA.
- Under the ITA, the definition of lawyer includes solicitors and notaries.

Facts (cont'd)

- Several Quebec notaries received requests from the CRA, but raised that these orders were in violation of their obligation to protect SCP.
- According to the CRA these requests fell within the accounting records exception to SCP under the ITA.
- The *Chambre des notaires* (the "*Chambre*") instituted a declaratory action against the CRA and the Attorney General of Canada ("**AGC**") for the purpose of having ss. 231.2 and 231.7 declared unconstitutional and of no force and effect with respect to notaries.
- The *Chambre* argued that the provisions authorized unreasonable searches and seizures, contrary to section 8 of the Canadian Charter of Rights and Freedoms (the "**Charter**").
- Both the Superior Court and the Court of Appeal granted the requested declaration.

Main Issues and Decision

- Do ss 231.2 and 231.7 and the definition of SCP in 232(1) infringe the right guaranteed by s.8 of the Charter insofar as they apply to lawyers and notaries?

  Decision: Yes

- Is the Infringement reasonable pursuant to s. 1 of the Charter?

  Decision: No

Unanimous Reasons

- To establish an infringement of s. 8, two elements are normally required:
  - 1) Did the government action intrude upon an individual's reasonable expectation of privacy? If so, this constitutes a seizure.
  - 2) Is the seizure an unreasonable intrusion on that right to privacy? If so, s. 8 is infringed.

Unanimous Reasons (cont'd)

Reasonable expectation of privacy

- SCP is a principle of fundamental justice ("**PFJ**"), a substantive legal rule and an important civil and legal right.
- The fact that the requirement is in an administrative and not a criminal context is not relevant as regards SCP, in that SCP must be protected no matter the nature of the legal advice being sought or the context in which it is sought.
- Indeed, a person's expectation of privacy in relation to communications subject to SCP is always high.
- In this way, it must be distinguished from the Court's decision in *Thompson Newspapers* ([1998], 1 SCR 877) where the information being sought was directly in the hands of the person subject to the regulatory framework. Here, the records sought are in the hands of legal advisors, which people expect, legitimately, to be protected by SCP.
- The requirement under s. 231.2(1) ITA constitutes a seizure under s. 8.

Unanimous Reasons (cont'd)

Unreasonable Intrusion

- The usual balancing exercise conducted under this second factor of s. 8 is not helpful in the context of SCP.
- Indeed, given that SCP is a PFJ, the standard for intruding upon it is *absolute necessity*, nothing less.
- The Court rejects the ARC and CRA's argument that information contained in accounting records are facts and not communications, and therefore not protected by SCP. It states such a strict demarcation cannot be drawn when it comes to SCP, given the danger of revealing information properly protected by SCP. There is a rebuttable presumption that all communications and information shared between a legal advisor and client is privileged.
- The Court refuses to distinguish SCP and secret profesionnel in Quebec, and rejects the *Chambre*'s argument that notaries face greater risk that documents they disclose will be protected by secret professionnel.

Unanimous Reasons (cont'd)

- The Court identifies several constitutional defects that render the intrusion unreasonable:
  - Clients are not notified that a requirement to produce records has been sent to their legal advisor, removing their ability to ensure their right to SCP is protected, which is a right that belongs to them, not their advisors.
  - The scheme puts an unfair burden on legal advisors to decide when a particular document is protected or not, the whole under threat of legal action should they refuse to disclose documents. This threat of persecution creates a conflict for lawyers.
  - The scheme does not ensure that disclosure of documents potentially protected by SCP is a last resort. Indeed, there is no requirement that the CRA first attempt to obtain the information from other sources, such as the client or financial institutions or another third party not subject to SCP obligations. The Court specifies that this in itself would not be fatal to the scheme in the absence of the prior two defects.
  - The scheme's defects could have been mitigated. Here, the court highlights the agreement that was struck between Revenu Quebec with regard to equivalent provisions in certain Quebec statutes. Revenu Quebec agreed to several measures that limit the State's impairments of SCP.

Unanimous Reasons (cont'd)

- Despite its conclusion with regard to the requirement scheme in general, the Court insists that it must address the definition of SCP contained s. 232(1) given its recognition in *Thompson Newspapers* that stated s. 232(1) constituted a clear and unequivocal abrogation of SCP by Parliament.
- The Court finds that this abrogation, i.e. the exception for accounting records set out in the definition of SCP, is in itself a violation of s. 8 of the Charter by allowing the unreasonable seizure of information found in the accounting records of notaries and lawyers.
- Accounting records are protected information according to jurisprudence given that they may include detailed information about the mandate between a professional and his/her client, and that in certain circumstances even the amount paid by a client may be legitimately protected by SCP. As such, the blanket exclusion of accounting records from the protection of SCP, in a context where accounting records is not even defined, creates a risk of violation of SCP, and therefore does not meet the absolute necessity threshold.

Unanimous Reasons (cont'd)

- The exception is broad and undefined, and not absolutely necessary to achieve the purpose of the legislation. As such, it is unreasonable and contrary to s. 8.
- In addition, the ITA provides only a vague limit to what the CRA can do with information once it is obtained. There are no restrictions on sharing the information with other government agencies as long as the CRA does so for a purpose related to the administration or enforcement of the ITA. It would be unacceptable to allow the State to make use of an administrative procedure to obtain information otherwise protected by SCP, and then allow it to use that information for other purposes simply because Parliament excluded accounting records from the definition of SCP.

Unanimous Reasons (cont'd)

Section 1 analysis

- Despite the pressing and and substantial objective of the impugned provisions, these provisions fail at the minimally impairing stage of the s. 1 analysis, for the reasons already discussed.

Remedy

- Sections 231.2 and 231.7 ITA are unconstitutional insofar as they apply to lawyers and notaries, and are read down to exclude lawyers and notaries in their capacity as legal advisors from their operation.
- The definition of SCP at s. 232(1) is declared unconstitutional and invalid.

Facts

- In the context of an investigation of certain alleged errors committed by a claims adjuster employed by Aviva Insurance Company of Canada ("**Aviva**"), the syndic of the *Chambre de l'assurance des dommages* requested that Aviva provide a copy of its file for the insurance claim in which misconduct was alleged.
- The syndic based its request on s. 337 of the *Act Respecting the Distribution of Financial Products and Services*, CQLR, c. D-9.2 ("ADFPS"), which provides that "Insurers […] must, at the request of the syndic, forward any required document or information concerning the activities of a representative".
- Aviva produced a number of documents, but withheld others invoking SCP and litigation privilege ("**LP**").

Facts (cont'd)

- The syndic applied for declaratory judgement against Aviva to obtain the documents.
- Meanwhile, Aviva and the insured person reached an out of court settlement and Aviva then sent the syndic the entire file, however, the syndic proceeded with its motion given that it raised an important question.
- At the hearing of the motion, the syndic conceded that SCP could be asserted against it.
- Judgments at all levels were thus limited to the applicability of LP against the syndic. The Superior Court and the Quebec Court of Appeal ruled in favour of Aviva.

Main Issues and Decision

- Can LP be asserted against parties like the syndic who have a duty of confidentiality?

  Decision: Yes

- Were there any exceptions to LP applicable in this case that would have permitted to lift LP and disclose documents to the syndic?

  Decision: No

- Can s. 337 ADFPS be interpreted as establishing a valid abrogation of the privilege, considering its general language?

  Decision: No.

Unanimous Reasons

Characteristics of LP

- There are differences between SCP and LP, however, they share a common cause: the secure and effective administration of justice.
- LP is a class privilege, similar to settlement privilege and informer privilege, covering all documents whose dominant purpose is litigation, incl. non-confidential documents and documents not directed at communications between solicitors and clients, where litigation or related litigation is pending or may reasonably apprehended. Once these conditions are met, there is a prima facie presumption of inadmissibility.
- Conduction a balancing of interests is not appropriate to class-privileges, including LP.

Can LP be asserted against third parties like the syndic?

- Yes, which flows from the fact that LP is a class privilege of fundamental importance.
- The fact that the syndic has a duty of confidentiality is not relevant, as they could be compelled to produce records in their possession, and they would not be able to assert LP to refuse to disclose them.

Unanimous Reasons (cont'd)

Do any exceptions to LP apply to lift LP in this case?

- The only recognized, limited exceptions that can lead to piercing LP relate to:
  - public safety
  - the innocence of the accused and criminal communications
  - evidence of the claimant party's abuse of process or similar blameworthy conduct.
- None of the above applied here.
- Aviva and the Syndic were agreed in proposing a new exception to LP, based on urgency and necessity. The SCC rejected this proposal for the moment, but did not shut the door to it in future cases.

Unanimous Reasons (cont'd)

Does s. 337 ADFPS constitute an abrogation of LP?

- Section 337 and the syndic's power to request a document or information does not constitute an abrogation of LP because the language used is very general.
- The same rules as for SCP apply to LP to abrogate the privilege by statutory instrument – the abrogation must be done with clear, explicit and unequivocal language.

Key Takeaways

- The Court provided a very clear response with regard to the ability for the legislator to abrogate or set aside both SCP and LP – the intention to do so must be crystal clear, and even where it is, it may be deemed unconstitutional.
- These decisions have a huge impact because of the number of statutes which provide for a power for a governmental or regulatory authority to compel the production of records.
- These decisions provide clarity for professionals responding to orders or requirements to disclose.

Oppression Remedy

Facts

- In the words of the Court, the facts of this case are "confused and confusing".
- Confusion stems from the fact that the affairs of the corporation were conducted in an extremely informal manner.
- Formality requirements under the CBCA were rarely complied with and almost nothing was put in writing, including Menillo's ("**M**") agreement with his business partner, Rosati ("**R**"), as to their respective roles in the corporation.
- The trial judge decided the case based on credibility of the testimony of M and R, siding with R/Intramodal Inc.'s ("**Intramodal**") version on most points.

Facts (cont'd)

- M and R incorporated Intramodal in 2004. The verbal agreement was that M would contribute the money, and R would run the business.
- R initially subscribed for 51 shares and M, for 49, but neither shareholder paid for their shares, and M never signed his share certificate.
- Between September and December 2005, M advanced 145,000$ to R. Intramodal began operating in 2005. M continued to advance money to R for a total of $440,000. No legal formality or contract was attached to these advances.
- On May 25, 2005, M resigned as an officer, director, and, purportedly, as a shareholder.

Facts (cont'd)

- An argument erupted in July 2007 – M felt he had not shared sufficiently in the success of the business.
- The money advanced by M to R, plus interest and a bonus was repaid entirely between July 2006 and December 2009, by way of cheques for the payment of fabricated invoices issued by a numbered company to Intramodal for "management" and "consultation fees" for a total of $690,000.
- In December 2009, R gave M a cheque for $40,000 marked "Full and Final Payment". M at this point consulted a lawyer.
- M applied for an oppression remedy against Intramodal in September 2010.

Main Issues and Decision

- Were the business or affairs of Intramodal carried on or conducted in a manner that was oppressive or unfairly prejudicial to or unfairly disregarded M's interests pursuant to s. 241(2) CBCA?

  Decision: No

Reasons of the Majority

- There is no palpable and overriding error in the trial judge's appreciation of the facts that justifies disturbing his finding that, as of May 25, 2005, M did not want to be a shareholder and transferred his shares to R.
- On those facts, the oppression claim is groundless.
- M could have no reasonable expectation of being treated as a shareholder since he no longer was one.
- The fact that the corporation failed to respect the required formalities for the transfer of shares by M to R is not unfairly prejudicial to M given that his removal as shareholder was what he expressly desired. It would not be just and equitable, therefore, for him to regain his status as shareholder.

Dissent (Côté J.)

- The majority decision makes light of two key principles of corporate law: a corporation's legal personality is distinct; and the maintenance of capital principle.
- The Corporation's conduct, by failing to respect important corporate formalities in the registration of a share transfer, was unlawful, and therefore, there is a presumption that a reasonable expectation of a shareholder, or former shareholder, has been violated.
- Reasonable expectation, where unlawful conduct is involved, is not a useful tool for analysis.
- Côté J. disagrees with the factual finding that M ceased to be a shareholder in May 2005. Accordingly, she finds that the corporation unlawfully and unilaterally stripped him of his shareholder status.

Dissent (Cont'd)

- Because the conduct was unlawful, it was oppressive.
- Mere irregularities that are not oppressive or unfairly prejudicial would not be sufficient to grant a remedy to the complainant.
- M could have (and perhaps should have) brought his complaint under sections 243 and 247, but in Côté J.'s view a pragmatic approach requires giving the remedy sought through 241, considering the Court's broad powers under this provision.
- M's claim is not prescribed because the right of ownership is perpetual – where the remedy sought is the acknowledgement of that right, the claim is never prescribed. Where the remedy sought is the enforcement of a right, the prescription period is 3 years.

Key Takeaways

- The majority reasoning favours a contextual, factual approach to assessing whether the constituents elements of an oppression claim, as set out in *BCE* (2008 SCC 69), are met, i.e. that the claimant had reasonable expectations, these expectations were violated by conduct that was oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder.
- This contextual approach is justified by the fact that the oppression remedy is an equitable remedy focussed on not what is legal but what is fair.

Key Takeaways

- The dissent attempts to move away from this approach developed first in *BCE* –and finds that unlawful conduct by the corporation, when this conduct threatens core corporate law principles, in itself justifies the intervention of the court and a finding of oppression.
- When attacking unlawful conduct, using articles 243 and 247 CBCA is likely more appropriate.
- Prescription relating to shareholder ownership remains unclear. Côté J. sides with the analysis of the Quebec Court of Appeal in *Greenberg v. Gruber* (2004 CanLII 14882). The majority declines to express an opinion.

Discounts and Mortgage Interest

Facts

- At issue was the validity of two renewal agreements of a mortgage granted by Equitable Trust Company ("**Equitable**") to Lougheed Block Inc. ("**Lougheed**"), one of the appellants in the case, to secure a $27M loan pursuant to Section 8 of the *Interest Act* ("**IA**").
- Under the first renewal agreement, the interest rate increased from prime + 3.125 % to 25 % at the end of the term.
- Under the second renewal agreement, the per annum rate was set at 25 % for the term of the agreement, but the monthly interest was set at 7.5% or prime + 5.25% (whichever was greater). The difference between the monthly rate and the per annum rate was added to the capital of the loan.
- If there was no default, that difference was forgiven and the effective rate of interest was the monthly rate. If Lougheed defaulted, it would be required to repay the loan at an interest rate of 25%.

Facts

- Section 8 of the IA, provides: "no fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principle money not in arrears".
- Section 2 of the IA provides: "Except as otherwise provided by this Act or any other Act of Parliament, any person may stipulate for, allow and exact, on any contract or agreement whatever, any rate of interest or discount that is agreed on".
- The chambers judge found that both agreements did not violate s. 8 IA, while the Alberta Court of Appeal unanimously found the first renewal did not violate the provision, with a majority finding the second renewal agreement also valid.
- Neither the Majority nor the Dissent at the Supreme Court found that the first renewal agreement violated s. 8 IA.
- Therefore, the analysis at the SCC focussed on the second renewal agreement.

Main Issues and Decision

- Does section 8 of the *Interest Act* preclude only rate increases imposing a penalty in case of default, or all rate increases triggered by default?

  Decision: All rate increases triggered by a default.

Reasons of the Majority

- The purpose of s. 8 IA is to protect landowners from any mortgage term that would have the effect of making it more difficult for borrowers already in default to redeem or protect their equity.
- In this way, s. 8 IA is directed at the effect of an interest triggering provision in a mortgage agreement, not the specific form of such a provision.
- Section 2, which enshrines contractual liberty within the IA's scheme, is expressly subject to the restriction imposed by s. 8.

Reasons of the Majority (Cont'd)

- Considerations of the commercial purpose of the agreement, or of the level of sophistication of the parties, as advocated by the Dissent, are irrelevant to the analysis given that this analysis is results, not purpose, oriented.
- Where discounts (incentives for performance) or penalties for non-performance have the effect of increasing the charge on arrears beyond the rate of interest payable on principal money not in arrears, the provision infringes s. 8.
- In the case at bar: The effect of the second renewal was to reserve a higher charge on arrears (25%) than that imposed on principal money not in arrears (7.5%). The labelling of one rate as the interest rate and the other as the pay rate (or "monthly rate") is of no consequence given s. 8 analysis' focus on substance over form, effects over purpose.

Dissenting Reasons of Côté J.

- First, Côté J. maintains that the rate of interest under the second renewal was 25%, therefore there was no increase in rate.
- Subsidiarily, Côté J. argues that s. 8 IA does not preclude incentives for performance in the form of a discounted interest rate. Section 2 enshrines contractual liberty, and therefore s. 8 must be read narrowly as an exception to the foundational rule in s. 2.
- Côté J. grounds this argument by appealing to a purposive and contextual analysis which considers the commercial context, according to which incentives for performance in the form of a discount on the interest rate help fulfill, not frustrate, the legislative intention of protected struggling debtors at the root of s. 8 IA.

Dissenting Reasons of Côté J. (cont'd)

- In the case at bar, the discount provided Lougheed with a less onerous path to fulfill its payment obligations that were already due under the first renewal agreement.
- Therefore, in the Côté J.'s view, declaring the 25% rate in the second renewal in violation of s. 8 IA rewarded Lougheed with an unmerited windfall, who agreed to the terms with its eyes open.

Key Takeaways

- An interest rate increase triggered by the passage of time does not infringe s. 8 IA, but a rate increase triggered by default does, irrespective of whether the increase is framed as imposing a higher rate as a penalty for default, or as allowing a lower rate by way of a reward for the absence of default.
- The majority reasons opt for an interpretation protective of "struggling borrowers", signalling clear limits to using interest rate variations as an incentive for performance under a mortgage, regardless of the sophistication of the parties to the mortgage agreement.

Dismissal without cause – Canada Labour Code

Overview

- An employee of the federally regulated Atomic Energy Board ("**AEB**") was dismissed without cause, and submitted a complaint under s. 240(1) of the Labour Code claiming he was unjustly dismissed.
- A labour adjudicator was appointed to hear the complaint. AEB sought a preliminary ruling on whether a dismissal without cause coupled with a severance package was necessarily a just dismissal, i.e. a dismissal not subject to the unjust dismissal provisions.
- After reviewing parliamentary debates and certain reports commissioned by the Minister of Labour, Abella J. concludes Parliament's intention behind amendments to the Canada Labour Code (in 1978) was to offer an alternative statutory scheme consisting of expansive protections much like those available to employees covered by a collective agreement.
- Indeed, Abella J. finds that the common law norm whereby an employer may dismiss an employee without cause if he or she is given reasonable notice or pay in lieu has been completely replaced by a scheme under the Code requiring reasons for dismissal.

Overview (cont'd)

- By enacting sections 240-246 on unjust dismissal, the effect was to limit the applicability of the notice provisions set out in s.230(1) and the minimum severance provisions in s. 235(1) to circumstances falling outside the unjust dismissal provisions, such as managers, those laid off due to lack of work or discontinuance of a function, or those who have been employed for less than 12 months.
- Employees may elect to pursue the common law remedy of wrongful dismissal in the civil courts, but in such case they forfeit the benefit of the statutory scheme. Conversely, the common law of wrongful dismissal does not apply where the employee pursues a complaint under the Labour Code for unjust dismissal.
- The dissent (Côté and Brown JJ.) agree with the courts below and find that nothing in the federal scheme precludes dismissal without cause, arguing among other things that the majority's interpretation of ss. 240-245 fundamentally alters the employment relationship to a "just-cause" regime, despite the absence of clear and unambiguous legislative intent to change the common law.

Key Takeaways

- An employer subject to the Canada Labour Code will always be exposed to a complaint under ss. 240 ff. where terminating employees without cause.
- It does not necessarily follow that the dismissal will be deemed unjust, however, appropriate severance is not enough to demonstrate the "just" nature of the dismissal.

Division of Powers in the Telecommunications Sector

Facts

- Rogers decided it needed to construct a new radiocommunication antenna system on the territory of the city of Châteauguay in order to fill gaps in its wireless telephone network. This new antenna was authorized by the Minister.
- Rogers entered into a lease with the owner of its selected property in Châteauguay and notified the municipality of its intention to construct a new antenna.
- This triggered a negotiation process with Châteauguay , who would have preferred Rogers construct the antenna on a different property. Unfortunately, the owner of that property was not interested in contracting with Rogers.
- Châteauguay requested Rogers delay construction to allow it to exercise its prerogative to expropriate its chosen property for Rogers to build on.

Facts (cont'd)

- The expropriation was contested by the owner, and therefore Rogers advised Châteauguay that it would begin construction on its selected property.
- Châteauguay proposed to Rogers that it delay its construction until the expropriation proceeding was decided. Before Rogers could respond, Châteauguay passed a resolution which authorized steps to create a land reserve on the property Rogers had leased for the purpose of construction of the antenna system. Two days later, it served a notice of reserve to Rogers.
- Châteauguay stated the purpose was to protect the health and well-being of its residents and to control the development of its territory.
- The effect of the resolution, which was renewed after two years, was to prevent Rogers from constructing the antenna.

Issues and Decision

- Is the notice of a reserve *ultra vires* the municipality on the basis that it relates in pith and substance ("P&S") to an exclusive federal power?

  Decision: Yes, which is sufficient in itself to rule on the case.

- Is the notice of a reserve inapplicable by reason of the doctrine of interjurisdictional immunity?

  Decision: Yes, the impairment was significant and serious, and went to the core of federal power over radiocommunication.

- Is the notice of a reserve inoperative by reason of the doctrine of federal paramountcy?

  Decision: None

- Is the notice of a reserve ultra vires the municipality in light of principles of municipal law?

  Decision: None

Reasons of the Majority

Pith and Substance

- The P&S is determined by examining both the purpose and the effects of the impugned legislation or measure.
- Both the purpose and the effects of the impugned notice of reserve must be analysed to determine its P&S.
  - In the case at bar, given the timing of the resolution in particular, the Court finds the purpose was to prevent Rogers from installing its antenna, not addressing its residents' health concerns.
  - The legal effect was to prohibit all construction on the property in question, while the practical effect was to prevent Rogers from constructing its antenna.
- Thus, the P&S of the measure was the choice of location of radiocommunication infrastructure, which falls within the federal power over radiocommunication. The measure is ultra vires the municipalities powers.

Reasons of the Majority (cont'd)

Interjurisdictional immunity ("**II**")

- The notice of a reserve is inapplicable to Rogers pursuant to the doctrine of II.
- The doctrine of II protects the core of a legislative head of power from being impaired by another level of government. The effect of the impugned measure on the protected power must be sufficiently serious.
- The application of the doctrine is generally reserved for situations covered by precedent.
- In the case at bar, a decision of the Privy Council in *Bell* ([1905] AC 52) already established that the siting of telecommunication poles was an essential part of the protected federal power of establishing a national communications network. The Court opines that the siting of a radiocommunication antenna is analogous.
- Thus, the location of the antenna is at the core of the federal power.
- In preventing Rogers from building the antenna for two successive two-year periods with no alternative solutions available to Rogers, the measure seriously impaired the exercise of the core federal power.

Key Takeaways

- The timing of the municipalities decision to establish a reserve influenced the Majority's analysis with respect to P&S.
- The case closes the door, on the basis of the doctrine of II, to a municipality's ability to supersede a federal power requiring use of land, even on legitimate bases falling squarely within its jurisdiction over property and civil rights.

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