

THE PROHIBITION TO DECODE ENCRYPTED SIGNALS UNDER THE RADIOCOMMUNICATIONS ACT OF CANADA

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ExpressVu Inc.. v. Nil Norsat International Inc., July 23, 1997, T-1639-96 (F.C.T.D.); confirmed by November 20, 1997, A-541-97 (F.C.A.)

In early 1997, a group of Canadian-based owners and operators of television services brought a civil action before the Federal Court of Canada, in an attempt to bar a number of importers, wholesalers and retailers from distributing receivers (small satellite dishes) and decoders in Canada. The equipment distributed by the defendants could only serve one purpose, that being to receive and decode certain encrypted Direct Broadcasting Satellite («DBS») television signals originating in the United States, the footprint of which covers an important part of Canada.

On a motion for summary judgement filed by defendant Nil Norsat International Inc. (c.o.b. *Aurora Distributing*, hereinafter «Norsat») in the course of the civil action, the trial division of the Federal Court concluded that the plaintiffs had a right of civil action pursuant to section 18 of the *Radiocommunications Act* (R.S.C. 1985, c. R-2, as amended by S.C. 1991, c. 11, hereinafter the «Act») as a result of the conduct of the defendants which was contrary to paragraph 10(1)(b) of the Act. The Federal Court of Appeal, in an unanimous decision, recently upheld this decision.

In 1991, the *Radiocommunications Act* was substantially amended by the same act that repealed and replaced the *Broadcasting Act*. Amendments to the Act included the addition of paragraphs 9(1)(c), (d) and (e), paragraph 10(1)(b) and section 18 which provides for a new right of civil action.

In order to ascertain its right of civil action against the defendants, each of the plaintiffs had first to demonstrate that it was a person with an interest either in subscription programming or in a broadcasting undertaking, as more

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fully defined in subsection 18(1), then to establish that the defendants were engaged in a conduct that is contrary to paragraph 10(1)(b) of the Act, and finally that it had suffered loss or damages resulting from said conduct.

Paragraph 10(1)(b) of the Act states that it is an offence for a person to manufacture, import, distribute, lease, offer for sale, sell, install, modify, operate or possess any equipment or device used or intended to be used for the purpose of contravening section 9 of the Act.

Both the trial and appellate courts decisions revolved around the interpretation of paragraph 9(1)(c) of the Act, which sets out a prohibition to «decode an encrypted subscription programming signal (...) otherwise than under and in accordance with the authorization from the lawful distributor of the signal».

In conjunction with the statutory definitions of «lawful distributor» and «subscription programming signal» provided by section 2 of the Act, the relevant portion of paragraph 9(1)(c) reads as follows:

*« No person shall decode an encrypted **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** otherwise than under and in accordance with an authorization from **a person who has the lawful right in Canada to transmit it and authorize its decoding.**»*

Before the trial judge, Norsat took the position that where there was no lawful distributor of an encrypted signal in Canada, paragraph 9(1)(c) should be interpreted so as not to render decoding a Direct to Home signal emanating from a DBS service provider outside of Canada an offence where the authorization of said service provider has been obtained.

The plaintiffs adopted a broader interpretation of the provision and argued that paragraph 9(1)(c) should be interpreted as prohibiting any decoding of encrypted subscription signals emanating from outside Canada, regardless of whether the authorization of the originator was obtained.

The trial judge, having been made aware of conflicting decisions rendered by Canadian criminal courts which had interpreted paragraph 9(1)(c), relied heavily on the analysis of Judge LeGrandeur in *R. v. Knibb (E.) et al.* ((1997), 198 A.R. 161). He agreed with Judge LeGrandeur's purposive approach to the interpretation of the provision: in the absence of an authoritative statement of purpose in the Act, its legislative history and other statutes enacted on the same subject may be considered.

The trial judge agreed that the 1991 amendments by which paragraph 9(1)(c) and other dispositions were incorporated into the *Radiocommunications Act* were part of a single regulatory scheme which aimed at regulating the broadcasting industry for the benefit of Canada and

Canadian culture. It serves to protect and enhance the business of broadcasting in Canada and also to assure the Canadian culture requirements and the concern that Canadians could effectively be «deculturized» by unregulated programming from outside services.

The stated policy in the *Broadcasting Act* makes clear that there is only one broadcast system in Canada that is to be regulated by a single entity. The interpretation of paragraph 9(1)(c) which would allow unfettered access to encrypted signals from outside Canada would authorize completely unregulated broadcasting in Canada, and this would not be consistent with the purpose of the regulatory scheme applicable to broadcasting in Canada.

The trial division therefore concluded that paragraph 9(1)(c) must be read to provide an absolute prohibition against the decoding of encrypted subscription programming signals, unless they emanate from a lawful distributor in Canada and that said distributor authorizes their decoding. For the Court, the scope of this provision could not be limited to the mere theft of signals through the unauthorized decoding of encrypted signals.

The Federal Court of Appeal found no ambiguity in the meaning of paragraph 9(1)(c). For the appellate Court, the signal identified in paragraph 9(1)(c) certainly includes a signal coming from the United States and the prohibition is not limited to instances of theft from lawful distributors in Canada.

As for the concept of *lawful distributor*, it «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».

Therefore, the provision, as drafted, creates an absolute prohibition, and proper authorization can only be obtained from a lawful distributor in Canada of the encrypted radiocommunication.

Deploring the fact that the material presented by the defendants was too fragmentary to be of any assistance in ascertaining the proper meaning of the provision as enacted, it concluded that the interpretation made by the trial division was entirely supported by the text of the provision and provided, as it was intended, a measure of control in Canada over the unfair competition which comes both from internal and external sources and is inherent in the reception and enjoyment of satellite services.



