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Update

Litigation Law

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The Comma Case Redux

Yesterday, the Canadian Radio-television and Telecommunications Commission (CRTC) revisited its 2006 decision with respect to what has become known as the million dollar comma case (in reality about $700,000). In a nutshell, Rogers Communications won the battle regarding the infamous comma, but lost its war against Bell Aliant.

This dispute concerned whether Rogers or Bell Aliant was required to bear the increased cost of access to power poles owned by NB Power. Rogers and Bell Aliant were parties to a support structure agreement governing Rogers' access to support structures that included power poles used by Bell Aliant. Under that agreement, Rogers was required to pay Bell Aliant only $9.60 per power pole it used. After NB Power raised the access price (eventually to $18 per pole), in early 2005 Bell Aliant provided Rogers with notice of termination of the agreement, claiming that notice became effective one year later. In response, Rogers claimed the agreement could not be terminated before its full five year term had run out. Battle was joined.

Rogers applied to the CRTC seeking a declaration that Bell Aliant could not terminate the agreement before the end of the five year term. Effectively, Rogers wanted Bell Aliant to be responsible for the increased cost of access to the power poles. The CRTC interpreted the following provision of the agreement focussing in part on the import of the second comma:

> Subject to the termination provisions of this Agreement, this Agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.

The CRTC found that, based on the rules of punctuation, the second comma meant that Bell Aliant could terminate the agreement on one year's notice and did not have to wait the full five years. Bell Aliant was found to be responsible for the increased fee for the one year notice period, but not thereafter.

Rogers then requested that the CRTC review and vary that decision. In yesterday's ruling, the CRTC found that the French version of the agreement not put forward by Rogers in its first application (which was not signed by the parties, but was approved in both languages by the CRTC) made it clear that the agreement could not be terminated before its five year term had run. The CRTC decided that since the agreement was a regulatory document, and not merely a private contract, the French and English versions had to be considered together. The CRTC found that it was appropriate to prefer the French version as it had only one possible interpretation (five years) – unlike the one or five year interpretations available under the English version. In other words, the CRTC reversed its view of the provision in question in favour of Rogers without relying on the infamous comma one way or another, and instead focussed on the multi-language regulatory nature of the document.

However, the CRTC also decided that since the agreement was a regulatory document, but the poles in question were power poles, the CRTC had no authority to grant Rogers the relief it was seeking. This finding was a result of the 2003 ruling of the Supreme Court of Canada that the CRTC had no jurisdiction over power poles (Goodmans acted as counsel for the successful power companies in that case). Thus, not only did the CRTC not give Rogers the relief to which it would have been entitled under the French version

of the contract, it also rescinded its ruling that Bell Aliant be responsible for the increased fees during the one year termination period. The CRTC bowed out of the dispute.

Thus, Rogers' request that the CRTC review and vary its first decision resulted in its losing even the gains Rogers had made in the CRTC's first adjudication of the dispute.

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