Federal Court of Appeal  Cour d'appel fédérale

Date: 20170503

Docket: A-198-16

Citation: 2017 FCA 92

CORAM: **NADON J.A.**
RENNIE J.A.
DE MONTIGNY J.A.

BETWEEN:

PEMBINA COUNTY WATER RESOURCE DISTRICT, CITY OF PEMBINA, NORTH DAKOTA, TOWNSHIP OF PEMBINA, NORTH DAKOTA, TOWNSHIP OF WALHALLA, NORTH DAKOTA, CITY OF NECHE, NORTH DAKOTA, TOWNSHIP OF NECHE, NORTH DAKOTA, TOWNSHIP OF FELSON, NORTH DAKOTA, TOWNSHIP OF ST. JOSEPH, NORTH DAKOTA, TIMOTHY L. WILWAND, DENNIS K. SCHALER, RICHARD MARGERUM AND VERLINDA MARGERUM

Appellants

and

GOVERNMENT OF MANITOBA AND RURAL MUNICIPALITY OF RHINELAND

Respondents

Heard at Winnipeg, Manitoba, on November 15, 2016.

Judgment delivered at Ottawa, Ontario, on May 3, 2017.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: RENNIE J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] By judgment dated June 2, 2016 (2016 FC 618), Mr. Justice Russell of the Federal Court (the Judge) struck out the appellants' amended statement of claim. More particularly, because of

his view that the Federal Court did not have jurisdiction over the subject matter of the amended statement of claim, he determined that the appellants' amended statement of claim disclosed no reasonable cause of action.

[2] For the reasons that follow, I conclude that there is no basis to interfere with the Judge's decision and consequently that we should dismiss the appeal.

II. Facts

[3] This litigation began in 2004. During the course of the trial in April 2016, in fact after three weeks of trial at which point the appellants had, for all intents and purposes, completed the presentation of their evidence, the respondents sought to strike the amended statement of claim on the basis that the Federal Court lacked jurisdiction in regard to the subject matter of the proceedings.

[4] The thrust of the proceedings commenced by the appellants, American governmental entities and American private land holders, is that a Canadian road blocks flood waters that would otherwise flow north from the United States into Canada from doing so, thus causing injury to their lands.

[5] As I understand the amended statement of claim, it appears that in the relevant areas of southern Manitoba, there is a 99 foot wide road allowance running parallel to the international border. In or around 1940, a raised road was constructed within this allowance. The road functions as a dike blocking the flood waters of the Pembina River from crossing into Canada.

Indeed, the appellants allege that the primary purpose of this construction is to block those waters.

[6] The Pembina River originates in Manitoba and crosses into North Dakota. It then flows eastwards through North Dakota before joining the Red River, which flows northward back into Canada. Within North Dakota, part of the river is "perched" meaning that it is elevated above the level of the surrounding prairie. When the river overflows these elevated banks, as the appellants allege happens "virtually every year," the water should naturally disperse. However, as the appellants also allege, the road construction in Manitoba blocks this natural dispersion, causing the flood waters to accumulate in North Dakota and damage their land.

[7] In making their claim against the respondents, the appellants plead and rely on the *International Boundary Waters Treaty Act*, R.S.C. 1985, c. I-17 (the Act) which enacted in Canadian domestic law the *Treaty relating to Boundary Waters and Questions arising along the Boundary between Canada and the United States, signed at Washington, January 11, 1909* (the Treaty). The Treaty, *inter alia*, gave injured parties rights of recovery in certain circumstances for damage caused by cross-border waters and created an International Joint Commission (the Commission), to oversee cooperation between Canada and the United States in regard to certain issues. The Treaty was enacted in Canadian domestic law via the Act, and it is now annexed to the Act as Schedule 1.

III. The Federal Court Decision

[8] Because I conclude that we should not intervene and, more particularly, because of my view that the Judge was correct in law, it will be appropriate to set out the Judge's rationale in some detail.

[9] First, the Judge made it clear that what was before him was a motion brought under Rule 221(1)(*a*) of the *Federal Courts Rules,* S.O.R. 98/106 (the Rules) pursuant to which a statement of claim may be struck if it discloses no reasonable cause of action. The Judge also stated that in determining such a motion, the applicable test was whether it was plain and obvious that the claim could not succeed (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 1990 CanLII 90).

[10] The Judge then turned to the test for Federal Court jurisdiction over a claim. He enunciated the test as follows, at paragraph 25 of his reasons:

> It is trite law that the Federal Court cannot acquire jurisdiction over any action unless:
>
> a) There is a statutory grant of jurisdiction by the federal Parliament;
>
> b) There is an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and
>
> c) The law on which the case is based must be a law of Canada in accordance with s 101 of the *Constitution Act, 1867*.
>
> [Citations omitted]

Although the Judge does not say so, that test is the one which the Supreme Court of Canada enunciated in *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1

S.C.R. 752, [1986] S.C.J. No. 38 at paragraph 11 [*ITO*]. At issue in this appeal is the first requirement of this test. In other words, has Parliament granted jurisdiction to the Federal Court to hear and determine the subject matter raised by the appellants in their amended statement of claim?

[11] As sections 4 and 5 of the Act are at the heart of the Judge's determination and of this appeal, it will be useful to reproduce these provisions:

4 (1) Any interference with or diversion from their natural channel of any waters in Canada, which in their natural channels would flow across the boundary between Canada and the United States or into boundary waters, as defined in the treaty, resulting in any injury on the United States side of the boundary, gives the same rights and entitles the injured parties to the same legal remedies as if the injury took place in that part of Canada where the interference or diversion occurs.	**4** (1) Toute altération, notamment par détournement, des voies navigables du Canada, dont le cours naturel coupe la frontière entre le Canada et les États-Unis ou se jette dans des eaux limitrophes, au sens du traité, qui cause un préjudice du côté de la frontière des États-Unis, confère les mêmes droits et accorde les mêmes recours judiciaires aux parties lésées que si le préjudice avait été causé dans la partie du Canada où est survenue l'altération.
(2) Subsection (1) does not apply to cases existing on January 11, 1909 or to cases expressly covered by special agreement between Her Majesty and the Government of the United States.	(2) Les cas survenus jusqu'au 11 janvier 1909 inclusivement et ceux qui sont expressément régis par la convention spéciale intervenue entre Sa Majesté et le gouvernement des États-Unis sont soustraits à l'application du paragraphe (1).
5 The Federal Court has jurisdiction at the suit of any injured party or person who claims under this Act in all cases in which it is sought to enforce or determine as against any person any right or obligation arising or claimed under or by virtue of this Act.	**5** La Cour fédérale peut être saisie par toute personne lésée ou se constituant en demandeur sous le régime de la présente loi, dans tous les cas visant la mise à exécution ou la détermination de quelque droit ou obligation découlant de la présente loi ou contesté sous son régime.

[12] The Judge began his analysis by briefly examining the parties' positions on the meaning of section 4. The Judge indicated that the respondents' position was that, as section 4 was unequivocal, a plain reading approach was in order. Thus, according to the respondents, there could be no doubt that the "waters" referred to in section 4 were waters which would normally flow from Canada into the United States if no interference or diversion occurred. In other words, the "waters" were waters running southward and not, as is the case here, running in the opposite direction, i.e. from the United States into Canada. The Judge stated the appellants' position to be that the "waters" referred to in section 4 were waters that would normally flow either north or south and that consequently the blockage on the Canadian side, which prevents the waters from coming into Canada from the United States, falls within the purview of section 4.

[13] The Judge then turned his attention to the interpretation of the Act and more particularly to section 4 thereof. He began by saying that the words of the statute had to be read in their entire context and in their grammatical sense harmoniously with the scheme of the Act, its object and Parliament's intention (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10). The Judge then focused on the word "waters" found in line 3 of section 4. He determined, at paragraph 34 of his reasons, that the appellants' claim was based upon the interference or diversion of "waters in Canada". He then determined that such waters, on a plain and grammatical sense, were necessarily waters that were in Canada when the interference or diversion occurred (paragraph 36).

[14] The Judge then turned, at paragraph 37 of his reasons, to the meaning of the words "which in their natural channels would flow across the boundary between Canada and the United

States or into boundary waters". In his view, section 4 pertained only to waters that were in Canada, i.e. waters that would flow in a southerly direction into the United States from Canada; the Pembina flood waters were not such waters as they were waters in the United States which would normally flow into Canada were it not for the blockage.

[15] In support of his view, the Judge turned to the French version of section 4 of the Act. At paragraph 39 of his reasons, he remarked that the French version differed in some respects from the English version and he explained those differences as follows:

> It is immediately apparent that the French version is somewhat different from the English version. It seems to me that the following distinctions can be made:
>
> a) The French version refers to "des voies navigable [*sic*] du Canada," while the English version refers to "any waters in Canada";
>
> b) Within the first distinction, it is also notable that the French version uses "du Canada," while the English version uses "in Canada";
>
> c) The operate verbs in French are in the present tense ("coupe" and "se jette") while the English version says "would flow";
>
> d) The English version uses "any interference or diversion" while the French version refers to "toute altération," but also particularizes with "notamment par détournement."

[16] The Judge then enunciated the legal principles applicable when comparing the French and English versions of a statute, i.e. that different versions were to be reconciled by the use of the "common meaning" or "shared meaning" principle (*R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217 at paras. 26 to 31; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390 at para. 53), and that in situations where neither the French nor the English version is ambiguous, or if they both were, the common meaning or shared meaning would normally be the narrower of the two versions (paragraphs 42 and 43 of Judge's reasons).

[17] Where, however, there is no common or shared meaning between the two versions, the Judge indicated that the Court should approach the matter through the usual interpretative aids and "conduct a textual, purposive and consequential analysis which will reference admissible extrinsic aids in order to determine legislative intent" (paragraph 44 of Judge's reasons).

[18] Then, at paragraphs 45 to 47 of his reasons, the Judge applied the above principles to make his determination which he explained as follows:

> [45] If I apply these principles to the present case, it seems to me that while there are clear distinctions in terminology between the French and English versions of s 4(1) of the [Act], their ordinary or common meaning for the issues at stake in this claim remain the same. Crucially, whether we are talking about "voies navigables" or "any waters," the statute is dealing with waters "in Canada." "Du" in the French version could have a possessive meaning but, in this context, it seems clear that the geographical meaning is intended. And, as I said earlier, the problems complained of by the Plaintiffs in this action are not connected to waters in Canada that cross the border or have crossed the border. They are caused by waters in the United States that pool in North Dakota and do not cross the border.
>
> [46] In this case, I think the common or shared meaning of the two versions for material purposes of these motions is clear.
>
> [47] In other words, I do not see how to avoid the conclusion that the wording of s 4 is sufficiently precise and unequivocal that the ordinary meaning of these words must play a significant role in interpretation. I do not think that the words themselves can support more than one reasonable meaning.

[19] The Judge then pointed out that the foundation of section 4 of the Act was Article II of the Treaty. The Judge's review of that provision of the Treaty led him to the conclusion that his interpretation of section 4 of the Act was the correct one.

[20] He then referred to and discussed Article IV of the Treaty which, in his view, clearly addressed the situation raised by the appellants in their amended statement of claim. His first

observation regarding Article IV was that, contrary to Article II, it did not provide or grant any rights or remedies to parties, whether American or Canadian, which they could assert or exercise following injury on their side of the border. In other words Article IV, other than providing that no dams or other obstructions in waters should be constructed or maintained without the approval of the International Joint Commission, is silent in all other regards. More particularly, the provision says nothing with respect to rights and remedies which might be available to those suffering injury by reason of the construction or maintenance of dams or other obstructions.

[21] The Judge's second observation regarding Article IV of the Treaty was that Articles II and IV of the Treaty were stand-alone provisions, contrary to the appellants' assertion that injuries resulting from the construction or maintenance of dams or other obstructions also fell within the ambit of section 4 of the Act. In other words, as it was clear to him that both Canada and the United States viewed the situations dealt with in Articles II and IV as distinct situations, it could not be said that the rights and remedies given to injured parties in Article II were also applicable to the factual situation addressed by Article IV. Thus, on that understanding of Articles II and IV of the Treaty, it could not be said that the rights and remedies provided at section 4 of the Act extended to the factual scenario found in the appellants' amended statement of claim.

[22] This led the Judge back to section 4 of the Act, i.e. the only provision on which the appellants rely to assert that the Federal Court has jurisdiction under section 5 of the Act. At paragraph 55 of his reasons, he made the following remarks:

> The only rights and obligations relied on by the Plaintiffs in their Amended Statement of Claim that are relevant for purposes of jurisdiction are those arising

> under s 4 of the [Act]. So unless s 4 can be said to encompass rights or obligations derived from Article IV, or any other article of the *Treaty* apart from Article II, there is no basis for the Federal Court to assume jurisdiction other than in the case of injuries suffered as a result of the situation set out in s 4. Section 4 clearly only deals with waters that flow across the international boundary in natural channels. It does not deal with the situation envisaged in Article IV of the *Treaty* where dams and obstructions on one side of the border have the effect of raising "the natural levels of waters on the other side of the boundary," which is the fact situation alleged by the Plaintiffs in their Amended Statement of Claim.

[23] The Judge then made the point that the legislative history and Parliamentary debates surrounding the adoption of the Treaty supported his interpretation of section 4.

[24] After referring to the speeches made in the House of Commons by the Minister of Public Works, the Minister of Justice and the Prime Minister of Canada, the Judge declared himself satisfied, at paragraph 61 of his reasons, that section 4 "only covers downstream situations where there is interference or diversion of 'waters in Canada' that would otherwise flow across the border into the United States (the Article II situation) and not the Article IV situation". Thus, in his view, since the allegations found in the appellants' amended statement of claim did not fall within the purview of section 4 of the Act, there was no jurisdiction in the Federal Court to hear and determine the matters raised in the pleadings. At paragraph 65 of his reasons, the Judge summarized his findings in the following terms:

> My only finding in these motions is that the Federal Court lacks the jurisdiction to hear the Plaintiffs' claim and to grant the relief sought by the Plaintiffs because s 4 of the [Act] does not cover the situation outlined in the claim whereby waters are blocked in Canada but only after they cross the border from the United States into Canada, or are pooled in the United States and do not cross the border into Canada. It could be that the Federal Court lacks the jurisdiction to hear this claim for other reasons (e.g. because the waters are not blocked in their natural channels) but other reasons are not before me.

[25] The Judge then dealt with a number of specific arguments made by the appellants. First, the Judge addressed the argument that the Court should adopt a more expansive interpretation of section 4, i.e. a purposive approach which takes into account not only the Act in its entirety, but the very purpose of the particular provisions of the legislation. More particularly, the appellants argued that the Court ought to carefully consider the language found both in the Preamble and the Proclamation of the Treaty.

[26] The Judge then turned to a number of submissions, presumably found in written representations filed before him by the appellants, concerning the meaning of Articles II and IV of the Treaty. Specifically, the appellants had argued in their memorandum as follows:

> 70. Article II of the Treaty then makes it clear that the application of the Treaty is not only to boundary waters but all waters which flow across the international boundary in their natural channels:
>
> …
>
> 71. Article II explicitly provides that any interference with or diversion from their natural channels of waters on either side of the boundary, will result in a remedy for those on the other side of the border. It is evident that while there remains jurisdiction and control only for each of the High Contracting Parties and the States or Provinces over the use and diversion on their own side, if they interfere or divert such waters, or some other person within the country does so without right, and injury is caused, the remedy to the injured party is available in accordance with the laws of the country in which the diversion or interference was made.
>
> 72. Article II does not, as argued by the Defendants, contain any reference and cannot be interpreted to contain a restriction requiring consideration of whether the injured party is upstream or downstream in order to ground jurisdiction.
>
> 73. It is the Plaintiffs' submission that the effect of Article II is supported by Article IV which reads:
>
> …
>
> 74. Article IV provides that Canada and the United States will not permit any dams or obstructions in rivers flowing across the boundary, the effect of which is

> to raise the natural level of waters on the other side of the border. The Article cannot be read alone as having no application lo [*sic*] the rights and remedies under the Treaty. It must be read purposively, and in support of the Plaintiffs' interpretation of Article II.

[27] The Judge was of the view that the appellants' above submissions were the result of a misreading of Article II of the Treaty. In so finding, he reiterated the reasons which he previously gave for his conclusion that section 4 of the Act did not apply to the events raised by the appellants in their amended statement of claim. At paragraph 73 of his reasons, the Judge wrote:

> Section 4 of the [Act] only enacts Article II into Canadian law. It says nothing about Article IV. This is why I cannot agree with the Plaintiffs' assertion that "Section 4 recognizes, and brings into effect in Canada the procedural remedy for the rights under the *Treaty* to those parties in the United States that are injured by interference or diversion of waters in Canada." For reasons already given, I think it is clear that s 4 of the [Act] cannot be read in this way. Article IV leaves the International Joint Commission to approve and deal with dams and obstructions that "raise the natural level of waters on the other side of the boundary…." This is the situation of which the Plaintiffs complain in this action. Article IV does not require Canada and the United States to give injured parties procedural rights in each other's courts. This does not mean that parties in the United States who are injured as a result of situations described in Article IV do not have the right to seek redress in Canada. But it does mean that any such rights do not arise through the enactment of s 4 of the [Act] or any other provision of that statute. By virtue of s 5 of the [Act], the Federal Court can have no jurisdiction to deal with claims that do not arise (procedurally) under that Act.

IV. The Appellants' Submissions in this Appeal

[28] The appellants argue that the Judge erred in his interpretation of the legislation in four ways. First, he failed to recognize that the Treaty was part of Canadian law and, therefore, that it must be used to interpret the Act.

[29] Second, the appellants say that the Judge did not interpret the Act using a large and liberal construction. The Treaty has been "incorporated by reference" and has the status and force of domestic law. Therefore, any interpretation of the Act must "commence with a consideration of the Articles of the Treaty". The Preamble indicates that the Treaty is meant to provide comprehensive dispute settlement. The appellants argue that Article II should be properly read to create an avenue for redress of any interference or diversion on one side of the boundary that causes injury on the other. The word "flow" should not "be restricted to the location of a diversion or interference". They assert that Article IV of the Treaty does not function in isolation from Article II and indeed supports the interpretation that waters cannot be interfered with on either side.

[30] The appellants argue that section 4 of the Act enacts the procedural remedy for injured American parties. In their submission, section 4, properly read, has two conditions: 1) the interference or diversion must occur in Canada, and 2) the water would normally cross the border in any direction.

[31] The appellants argue that the French text of section 4 of the Act supports their interpretation of the provision that the flow of the water can be in either direction. Indeed, the Act itself defines "transboundary waters" to be those flowing across the border, regardless of direction. The Judge wrongly read-in the requirement that the flow of the water be in a particular direction.

[32] Third, the appellants argue that the Judge's interpretation leads to an absurd result. The Treaty was designed to remedy injury done by cross-border water flows but some injured parties would be left without remedy because of the direction of flow of the water causing their injury.

[33] Finally, the appellants take issue with the Judge's treatment of the legislative history. In their view, House of Commons debates can illustrate the background and purpose of legislation but must be viewed as political documents. The major issue at the time was irrigation; therefore there is little mention of flooding in the debates. However, the debate transcripts show that the Canadian government intended to create avenues for redress for injured parties. The transcripts also explain why the Exchequer Court (as it then was) was chosen as the designated judicial forum.

[34] In conclusion, the appellants submit that the Judge erred in concluding that it was "plain and obvious" that on the basis of the amended statement of claim, the Federal Court did not have jurisdiction over the subject matter raised by the pleadings. The appellants say that statements of claim must only include material facts, not law and that, therefore, on a proper purposive reading, the Act gives the Federal Court jurisdiction over the dispute.

V. Analysis

[35] To begin with, a few words concerning the applicable standard of review will be in order. All of the parties are agreed that the applicable standard is that of correctness as the issue which the Judge had to determine was a pure question of law, namely whether the Federal Court has jurisdiction over the appellants' claim. I see no basis to disagree with the parties on this question

and therefore the Judge's decision will be reviewed on the standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8).

[36] As I indicated earlier, section 4 of the Act is crucial to the determination of this appeal since the appellants rely on no other provision of the Act. I agree with the appellants that section 4 must be read in light of the Treaty provisions. However, the appellants have failed to persuade me that the Judge made a reviewable error in concluding that the Federal Court was without jurisdiction.

[37] Section 4 of the Act, as the respondent the Government of Manitoba points out, is a procedural provision, the purpose of which is to grant parties in the United States, who suffer injury by reason of the circumstances set out in the provision, the rights and remedies which they would have had if their injury occurred in Canada. Thus, section 4 does not grant these parties any particular right or remedy other than those which could be exercised had their injury occurred in Canada.

[38] Consequently, if the subject matter of the appellants' pleadings falls within the purview of section 4, then, by reason of section 5, the Federal Court has jurisdiction. If, however, the matters raised by the appellants' pleadings do not fall within section 4, the Federal Court is without jurisdiction.

[39] Before proceeding, it is important to recall that the appellants allege in their pleadings that the respondents blocked or obstructed waters situated in the United States from flowing

across the boundary into Canada and that, as a result, those waters remained in the United States and flooded their lands. At paragraph 14 of their amended statement of claim, the appellants say:

> The plaintiffs say the said road allowance was constructed as a dike by the municipal defendants or with their knowledge and consent, either express or implied. Alternatively, the plaintiffs further say that the construction of the dike, as aforesaid, was done for the sole and explicit purpose of blocking water flowing in natural watercourses from entering Canada in the knowledge that water that would otherwise flow into Canada would be turned back into the United States and, more specifically, the lands located in the Townships of Pembina, Neche, Felson, St. Joseph, Walhalla, ~~Joliette, Lincoln and Drayton~~ and within the cities of Pembina, Neche, ~~Walhalla and Drayton~~, with the certain result that damage would be caused to the owners and occupiers of land located therein, including the plaintiffs and to the real property owned by the plaintiffs.
>
> (strike through and underlining as appear in amended statement of claim)

[40] The question is whether that scenario falls under section 4 of the Act. In my respectful view, it clearly does not. I need not give here a long explanation other than saying that I am in complete agreement with the reasons given by the Judge in concluding that section 4 of the Act and the relevant provisions of the Treaty did not support the appellants' position. I would further say that I cannot see how section 4, on the basis of its wording and in the light of the Treaty provisions, can be interpreted otherwise.

[41] I will now address the specific points which the appellants make in arguing that the Judge erred and that consequently we should intervene.

A. *What is the Status of the Treaty in Canadian Law?*

[42] First, the appellants say that the Judge erred because he failed to recognize that the Treaty was part of Canadian law and that it was to be used in interpreting the Act.

[43] I agree with the appellants that the Treaty must be used to interpret the Act. However, in my opinion, the Judge did not disagree with that proposition in determining the motions before him. More particularly, I am satisfied that not only did he accept the general proposition put forward by the appellants on this question but that his interpretation of section 4 of the Act was informed by his understanding of the Treaty provisions.

[44] The Treaty, which is annexed as Schedule I of the Act, has been incorporated into Canadian law. As Ruth Sullivan explains in *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016) at page 171:

> Although schedules are considered internal rather than external, not all scheduled materials have the force of law. To be considered part of what is enacted into law, the scheduled material must be incorporated into the Act either expressly or by implication. Incorporation is generally accomplished by a provision in the body of the Act or regulation that refers to the schedule. Once incorporated, scheduled material is as much a part of an Act as its sections and subsections, and it has the same significance and use in interpretation.
>
> (emphasis added)

[45] The Treaty has been incorporated into the Act and it is "confirmed and sanctioned" by section 2. Section 3 further states that:

3 The laws of Canada and of the provinces are hereby amended and altered so as to permit, authorize and	**3** Les lois fédérales et provinciales sont modifiées de manière à d'une part, permettre, autoriser et

sanction the performance of the obligations undertaken by His Majesty in and under the treaty, and so as to sanction, confer and impose the various rights, duties and disabilities intended by the treaty to be conferred or imposed or to exist within Canada.	sanctionner l'exécution des obligations contractées par Sa Majesté aux termes du traité, et, d'autre part, sanctionner et établir les différents droits, devoirs et incapacités imposés par le traité au Canada sur son territoire.

[46] The Supreme Court has recognized that treaties play a role in interpreting the domestic legislation that implements them. In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paragraph 55, the Supreme Court, with Mr. Justice Bastarache writing for the majority, said that this Court had erred in not considering the object and purpose of an international treaty underlying domestic legislation. In *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at paragraph 75, the Supreme Court, with Mr. Justice Gonthier writing for the majority, specified that recourse can be had to international treaties even where the legislative provision is not ambiguous (overturning this Court on this point). In addition, there is a presumption that the legislature intends to comply with Canada's international obligations (Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016) at 279-280, 311; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281 at para. 34; Merck Frosst Canada Ltd v. Canada (Health), 2012 SCC 3, [2012] 1 S.C.R. 23 at para. 117; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at para. 53).

[47] As the appellants point out, the principles of domestic statutory interpretation are reflected at the international level by Article 31(1) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331. Whether interpreting a statute or a treaty, the focus is on the text, context and purpose.

[48] All of these provisions, in my respectful view, lead to the conclusion which the Judge reached in regard to the waters at issue under section 4 of the Act.

B. *The Requirements of Section 4 of the Act*

[49] I now turn to the appellants' second submission on this appeal. They say that the Judge erred because he did not interpret the Act using a large and liberal construction. In my view, that submission is without merit.

[50] Both parties allege that section 4 gives injured parties legal rights in Canada if two conditions are met. Those two conditions stem from the same words in the text, which the parties interpret to mean different things.

[51] The first requirement comes from the words:

Any interference with or diversion from their natural channel <u>of any waters</u> in Canada….	Toute altération, notamment par détournement, des <u>voies navigables</u> du Canada…
(emphasis added)	(nous soulignons)

The parties disagree on what must be "in Canada". The respondents say that the waters must be in Canada. The Judge accepted that view. The appellants say, and urge us to find, that it is the interference or diversion, not the waters, that must occur in Canada.

[52] In my view, the position taken by the respondents is correct. On the basis of the common meaning of both the English and French versions of section 4, I must conclude that section 4

applies to waters that are in Canada. The French version makes this clear. The preposition "du" can have a geographic meaning (waters in Canada) or a possessory meaning (waters of Canada). The geographic meaning is shared by both versions and, in my view, must prevail. The French version makes no comment on where the interference with the waters must occur, avoiding the ambiguity present in the English version. The preposition "du" joins "des voies navigables" to "Canada". The words "du Canada" cannot relate to the "altération, notamment par détournement". Therefore, the only possible conclusion is that section 4 applies to waters that are physically in Canada.

[53] The second requirement stems from the following language:

… which in their natural channels would flow across the boundary between Canada and the United States or into boundary waters	... dont le cours naturel coupe la frontière entre le Canada et les États-Unis ou se jette dans des eaux limitrophes
(emphasis added)	(nous soulignons)

[54] Building on his interpretation of the first requirement, the Judge reasoned that waters in Canada could only flow from Canada into the United States. The appellants argue that the Judge's interpretation constitutes an improper reading-in of extra words into the provision, and that the plain meaning of "flow across the boundary" includes movement in any direction. I agree with the appellants' plain language reading of the phrase. Similarly, the French version does not indicate that the flow of the water must be in a particular direction.

[55] The fact situation at issue appears to meet the second requirement - but for the road, the water would flow across the boundary. However, whether the water is "in Canada", and

therefore meets the first requirement, is less clear. The amended statement of claim says only that the road allowance comprises the 99 feet immediately adjacent to the border, and that the road is built within this allowance. The pleadings do not indicate how far from the border, if any distance, the road is located. If the water never crosses into Canada, it would not meet the first requirement of section 4.

[56] However, if the water does flow a small distance into Canada before reaching the road, the water has flowed into Canada, and therefore does not meet the second requirement, phrased in the conditional, that the water "would flow across the boundary" but for the interference or diversion. I therefore reach the same conclusion as the Judge - waters that are in Canada can only flow across the border in one direction, i.e. into the United States. While the plain language of the provision does not specify a direction of flow, logic does. Therefore, on a textual analysis, I can only conclude that section 4 does not encompass the fact scenario at issue.

C. *Interpreting the Act and the Treaty as a Whole*

[57] The appellants say, and as I have already indicated I agree with their proposition, that in order to interpret the provisions of the Act, consideration of the Treaty provisions is necessary.

[58] In my view, a proper reading of the relevant provisions of the Treaty confirms the conclusion reached by the Judge in regard to sections 4 and 5 of the Act. In other words, the relevant provisions of the Treaty confirm, in my respectful opinion, that the factual situation put forward by the appellants in their amended statement of claim is not one in respect of which the Federal Court has jurisdiction pursuant to section 5 of the Act.

[59] I begin with Article II of the Treaty in regard to which the appellants say that it is not limited to boundary waters but to all waters which flow across the international boundary in their natural channels. More particularly, they say that Article II can refer to waters that both flow from or to Canada or the United States, adding that the Article creates rights that would not otherwise be available to injured inhabitants of the two countries. In my respectful view, the Judge's interpretation of Article II cannot be faulted. In other words, I am satisfied that Article II of the Treaty clearly supports the Judge's interpretation of section 4 of the Act. Article II of the Treaty reads as follows:

Article II	*Article II*
Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.	Chacune des Hautes parties contractantes se réserve à elle-même ou réserve au Gouvernement des différents États, d'un côté, et au Dominion ou aux gouvernements provinciaux, de l'autre, selon le cas, subordonnément aux articles de tout traité existant à cet égard, la juridiction et l'autorité exclusive quant à l'usage et au détournement, temporaires ou permanents, de toutes les eaux situées de leur propre côté de la frontière et qui, en suivant leur cours naturel, couleraient au-delà de la frontière ou se déverseraient dans des cours d'eaux limitrophes, mais il est convenu que toute ingérence dans ces cours d'eau ou tout détournement de leur cours naturel de telles eaux sur l'un ou l'autre côté de la frontière, résultant en un préjudice pour les habitants de l'autre côté de cette dernière, donnera lieu aux mêmes droits et permettra aux parties lésées de se servir des moyens que la loi met à leur disposition tout autant que si telle injustice se produisait dans le pays où s'opère cette ingérence ou ce détournement; mais cette disposition

	ne s'applique pas au cas déjà existant non plus qu'à ceux qui ont déjà fait expressément l'objet de conventions spéciales entre les deux parties concernées.
It is understood however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.	Il est entendu cependant, que ni l'une ni l'autre des Hautes parties contractantes n'a l'intention d'abandonner par la disposition ci-dessus aucun droit qu'elle peut avoir à s'opposer à toute ingérence ou tout détournement d'eau sur l'autre côté de la frontière dont l'effet serait de produire un tort matériel aux intérêts de la navigation sur son propre côté de la frontière.

[60] The first part of the first paragraph of Article II indicates that both Canada and the United States retain their jurisdiction with regard to the use and diversion of waters on their side of the line and hence, both countries can use and divert those waters subject to the second part of the first paragraph.

[61] The second part of the first paragraph of Article II addresses the consequences resulting from interference or diversion "of such waters on either side of the boundary" by providing that "any injury [occurring] on the other side of the boundary", i.e. either in Canada or in the United States, shall entitle parties injured by the interference or diversion to rights and remedies which would be available to them had their injury occurred in the country where the diversion or interference occurred, i.e. in this case Canada. In other words, aggrieved American parties or entities who suffer injury in the United States by reason of interference or diversion by Canada "of such waters", shall be entitled to those rights and remedies which would be available to them had their injury occurred in Canada, where the diversion or interference took place.

[62] In my view, the words "such waters" found in Article II of the Treaty are not only unambiguous, they are crystal clear. The words "such waters" serve to qualify the waters over which Canada and the United States have retained exclusive jurisdiction in the first part of the first paragraph of Article II. In my respectful opinion, no other interpretation of Article II is possible. Consequently, as the appellants allege in their amended statement of claim that the respondents interfered with or diverted waters situated in the United States which would have flowed across the boundary into Canada, thus causing injury in the United States, the factual scenario raised in the appellants' pleadings does not fall within the ambit of Article II of the Treaty.

[63] This leads me to a discussion of Articles III, IV, VI and VIII of the Treaty. I begin with a discussion of Articles III and IV, which read as follows:

Article III	*Article III*
It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.	Il est convenu que, outre les usages, obstructions et détournements permis jusqu'ici ou autorisés ci-après, par convention spéciale entre les parties, aucun usage ou obstruction ou détournement nouveaux ou autres, soit temporaires ou permanents des eaux limitrophes, d'un côté ou de l'autre de la frontière, influençant le débit ou le niveau naturels des eaux limitrophes de l'autre côté de la frontière, ne pourront être effectués si ce n'est par l'autorité des États-Unis ou du Dominion canadien dans les limites de leurs territoires respectifs et avec l'approbation, comme il est prescrit ci-après, d'une commission mixte qui sera désignée sous le nom de « Commission mixte internationale ».
The foregoing provisions are not	Les stipulations ci-dessus ne sont pas

intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

destinées à restreindre ou à gêner l'exercice des droits existants dont le gouvernement des États-Unis, d'une part, et le gouvernement du Dominion, de l'autre, sont investis en vue de l'exécution de travaux publics dans les eaux limitrophes, pour l'approfondissement des chenaux, la construction de brise-lames, l'amélioration des ports, et autres entreprises du gouvernement dans l'intérêt du commerce ou de la navigation, pourvu que ces travaux soient situés entièrement sur son côté de la frontière et ne modifient pas sensiblement le niveau ou le débit des eaux limitrophes de l'autre, et ne sont pas destinées non plus à gêner l'usage ordinaire de ces eaux pour des fins domestiques ou hygiéniques.

Article IV

The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

Article IV

Les Hautes parties contractantes conviennent, sauf pour les cas spécialement prévus par un accord entre elles, de ne permettre, chacun de son côté, dans les eaux qui sortent des eaux limitrophes, non plus que dans les eaux inférieures des rivières qui coupent la frontière, l'établissement ou le maintien d'aucun ouvrage de protection ou de réfection, d'aucun barrage ou autre obstacle dont l'effet serait d'exhausser le niveau naturel des eaux de l'autre côté de la frontière, à moins que l'établissement ou le maintien de ces ouvrages n'ait été approuvé par la Commission mixte internationale.

Il est de plus convenu que les eaux définies au présent traité comme eaux limitrophes non plus que celles qui coupent la frontière ne seront d'aucun côté contaminées au préjudice des biens ou de la santé de l'autre côté.

[64] The works described in Articles III and IV of the Treaty require approval of the Commission. Thus, neither Canada nor the United States can proceed with such works, subject to the exceptions provided, without the blessing of the Commission. It is also clear that the factual situation set out in the appellants' pleadings falls within the purview of Article IV, as the appellants allege that the respondents have built a dike which prevents waters in the United States from naturally flowing into Canada.

[65] The difficulty which the appellants face is that no provision of the Act does for Articles III and IV of the Treaty what section 4 of the Act does for Article II of the Treaty. In other words, the situations described in Articles III and IV of the Treaty, contrary to the situation described in Article II, do not fall within the purview of section 4 of the Act.

[66] Further, neither Articles III nor IV of the Treaty address or contemplate injuries which might result from the construction or maintenance of the works described in those provisions. Both Articles are silent on that count. Articles III and IV simply provide that the works described therein cannot proceed unless the Commission approves of them. What, if any, rights or remedies arise from the construction or maintenance of these works without the approval of the Commission is not addressed in Articles III and IV.

[67] The next Treaty provision of relevance is Article VIII which grants the Commission jurisdiction in regard to cases arising from the works described at Articles III and IV. The provision, in its relevant parts, reads as follows:

Article VIII	*Article VIII*
This International Joint Commission	La Commission mixte internationale

shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose:	devra entendre et juger tous les cas comportant l'usage ou l'obstruction ou le détournement des eaux à l'égard desquelles l'approbation de cette Commission est nécessaire aux termes des articles III et IV de ce traité, et en jugeant ces cas la Commission sera régie par les règles et principes qui suivent et qui sont adoptés par les Hautes parties contractantes pour cette fin :
…	[…]
In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.	Dans les cas entraînant l'élévation du niveau naturel des eaux de l'un ou l'autre côté de la ligne par suite de la construction ou de l'entretien de l'autre côté d'ouvrages de secours ou de protection ou de barrages ou autres obstacles dans les eaux limitrophes ou dans les eaux qui en proviennent ou dans les eaux en aval de la frontière dans des rivières qui coupent la frontière, la Commission doit exiger, comme condition de son approbation, que des dispositions convenables et suffisantes, approuvées par la Commission, soient prises pour protéger contre tous dommages tous les intérêts de l'autre côté de la frontière qui pourraient être par là atteints, et payer une indemnité à cet égard.
(emphasis added)	(nous soulignons)

[68] After setting out the order of preference which the Commission should observe in regard to the various uses of the waters discussed at Articles III and IV, Article VIII goes on to provide that in granting approval in regard to the construction of remedial or protective works, the Commission "shall require" that "suitable and adequate provision" be made so as to protect and

indemnify those persons or entities "on the other side of the line" who might suffer injury as a result of the works approved by it.

[69] Thus, it becomes clear that no rights or remedies similar to those granted by Article II of the Treaty are given to those who might suffer injury by reason of the works described in Articles III and IV. To the contrary, as I have just indicated, it is the Commission's responsibility, in adjudicating disputes under Articles III and IV of the Treaty, to provide compensation to those who might suffer injury by reason of the construction and maintenance of such works. It is important to say that there is no evidence before us as to whether or not the dike at issue was approved by the Commission. Even if I were to assume that no approval was given by the Commission, it does not follow, in my respectful opinion, that the appellants are entitled to benefit from the rights and remedies granted by Article II of the Treaty and by section 4 of the Act in regard to the specific factual situation described in those provisions.

[70] Articles III, IV and VIII do not provide for a specific right of redress for those who may be injured by the various works described in Articles III and IV. In contrast, Article II provides that injured parties would have the same rights and be entitled to the same legal remedies as if the diversion or interference occurred in their home country. In my opinion, Articles III, IV and VIII do not create any right of redress that benefits the appellants.

[71] One further provision of the Treaty is relevant to this appeal. Article VI deals with the St. Mary and Milk Rivers and their tributaries found in the State of Montana and the Provinces of Alberta and Saskatchewan, as follows:

Article VI

The High Contracting Parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each. It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October, inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow, and that Canada is entitled to a prior appropriation of 500 cubic feet per second of the flow of St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow.

The channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance, while passing through Canadian territory, of waters diverted from the St. Mary River. The provisions of Article II of this treaty shall apply to any injury resulting to property in Canada from the conveyance of such waters through the

Article VI

Les Hautes parties contractantes conviennent que les rivières Milk et Sainte-Marie soient, avec leurs affluents (dans l'État du Montana et dans les provinces d'Alberta et de la Saskatchewan), traités comme un seul et même cours d'eau pour les fins d'irrigation et de force hydraulique, et que leurs eaux soient attribuées par parts égales entre les deux pays, mais en faisant cette attribution par parts égales plus de la moitié des eaux d'une rivière et moins de la moitié de celles de l'autre puissent être prises de manière que chaque pays puisse tirer de ces eaux le plus grand avantage possible. Il est de plus convenu que, dans le partage de ces eaux pendant la saison d'irrigation, savoir du 1er avril au 31 octobre inclusivement, chaque année, les États-Unis ont droit les premiers à une prise de 500 pieds cubes par seconde dans les eaux de la rivière Milk, ou autant de cette quantité qu'il en faut pour constituer les trois quarts de leur écoulement naturel, de même que le Canada a droit le premier à une prise de 500 pieds cubes par seconde dans les eaux de la rivière Sainte-Marie, ou autant de cette quantité qu'il en faut pour constituer les trois quarts de leur écoulement naturel.

Le chenal de la rivière Milk au Canada peut être utilisé, à la convenance des États-Unis, pour l'apport, à travers le territoire canadien, des eaux détournées de la rivière Sainte-Marie. Les dispositions de l'article II de ce traité s'appliqueront à tout préjudice causé à des biens situés au Canada par l'apport de ces eaux s'écoulant par la rivière Milk.

Milk River.

The measurement and apportionment of the water to be used by each country shall from time to time be made jointly by the properly constituted reclamation officers of the United States and the properly constituted irrigation officers of His Majesty under the direction of the International Joint Commission.	Le jaugeage et l'attribution des eaux à être employées par chaque pays seront de tout temps effectués conjointement du côté des États-Unis, par les fonctionnaires du Reclamation Office régulièrement constitués, et, du côté canadien, par les fonctionnaires du service de l'irrigation aussi régulièrement constitués, sous la direction de la Commission mixte internationale.
(emphasis added)	(nous soulignons)

[72] Article VI provides that in respect of injury caused to property in Canada by reason of the aforesaid conveyance of waters through the Milk River, the provisions of Article II of the Treaty will be applicable. Thus, those in Canada whose property has suffered injury by reason of the conveyance of American waters through the Milk River will have the same rights and be entitled to the same remedies as those whose injury results from any interference with or diversion of the waters as described in Article II. In other words, the rights granted in Article II of the Treaty will apply to the factual situation set out in Article VI.

[73] In my respectful opinion, the reference in Article VI to Article II of the Treaty makes it absolutely clear that the rights and remedies of Article II were not meant to apply to the factual situations dealt with at Articles III and IV of the Treaty. Were that the case, the reference to Article II in Article VI would obviously not have been necessary.

[74] I therefore conclude that the Judge made no error of interpretation in regard to the Treaty provisions.

D. *The Absurdity Argument*

[75] I now turn to the appellants' third submission on this appeal which is that the Judge's interpretation of the Act and the Treaty leads to an absurd result. In my view, that argument cannot possibly succeed.

[76] The appellants say that the Judge's interpretation of section 4 would leave many injured parties without a remedy. The Judge dealt with this argument by saying that the appellants were not without recourse should they be unable to pursue the case in the Federal Court. More particularly, he wrote as follows at paragraph 75 of his reasons:

> There is no evidence before me to suggest that the Plaintiffs, or anyone else in their position in the United Sates, are without legal recourse in the event that their case cannot be pursued in the Federal Court. The Plaintiffs are asserting the torts of negligence and nuisance. I am not ruling that the Plaintiffs cannot pursue these claim [*sic*] in Canada, I am simply ruling that the Federal Court has no jurisdiction to hear them. Nor is there any evidence that if North Dakota obstructed the Pembina River and caused injury in Canada that the injured parties would have no recourse unless the Federal Court assumes jurisdiction. The Plaintiffs' allegations of absurdity are not proven.

[77] On this point, the respondent, the Rural Municipality of Rhineland, says that the appellants are not left without remedy and suggests that the Manitoba Court of Queen's Bench is the proper venue for their lawsuit. There would appear to be a sound basis for this view as the appellants allege to have suffered damages as a result of torts committed in Manitoba by the respondents. At first glance, there does not appear to be anything preventing the appellants from bringing an action before the Manitoba Court of Queen's Bench. In any event, I am satisfied that the Judge considered the appellants' absurdity argument and dealt with it correctly. I see no basis to interfere with his conclusion.

E. *Legislative Debates*

[78] The appellants' last argument is that the Judge did not properly appreciate the legislative history of the Treaty. More particularly, they say that the Judge failed to properly consider, interpret and apply the House of Commons debates.

[79] I have carefully considered the reasons given by the Judge in concluding that the Parliamentary record supports his interpretation of section 4 of the Act. He expresses his view as to the meaning and intent of what was discussed by Parliament. At paragraph 61 of his reasons, he opines that the Parliamentary record supports the interpretation that section 4 of the Act "only covers downstream situations where there is interference or diversion of 'waters in Canada' that would otherwise flow across the border into the United States (the Article II situation) and not the Article IV situation".

[80] My reading of the official report of the debates of the House of Commons of the Dominion of Canada, Third Session, Eleventh Parliament, 1-2 George V, 1910-11, leads me to the conclusions reached by the Judge. In my respectful view, the Judge did not, as the appellants urge us to find, place undue reliance upon those debates or fail to appreciate the context in which they occurred.

[81] On a separate point, the appellants are correct to say that a statement of claim need only contain the material facts, as indicated by the use of the mandatory "shall" found in Rule 174 of the *Federal Courts Rules*. Pleading law is optional, as indicated by the use of "may" in Rule 175

(see also *Conohan v. Cooperators (The)*, 2002 FCA 60, [2002] 3 F.C.R. 421 at para. 15). However, the appellants have not shown how the fact situation at issue could fall under another section of the Act and thus be justiciable at the Federal Court in accordance with section 5 of the Act.

[82] I add one last clarification in closing: as I indicated at paragraph 10 of these reasons, the only issue before us in this appeal is whether the first step of the *ITO* test is met. I have concluded that it is not. Given this finding, and as neither party has raised nor made submissions on the other two branches of the test, I need not address them.

VI. Conclusion

[83] For these reasons, I would dismiss the appeal with costs.

"M Nadon"

J.A.

"I agree

Donald J. Rennie J.A."

"I agree

Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	NOVEMBER 15, 2016
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	RENNIE J.A. DE MONTIGNY J.A.
DATED:	MAY 3, 2017

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