Date: 20080428

Dockets: A-591-06
A-17-07
A-590-06
A-18-07

Citation: 2008 FCA 157

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
RYER J.A.

BETWEEN:

A-591-06 and A-17-07

CANADIAN ASSOCIATION OF BROADCASTERS (THE APPELLANT ASSOCIATION), GROUP TVA INC., CTV TELEVISION INC., THE SPORTS NETWORK INC., 2953285 INC. (o.b.a. DISCOVERY CHANNEL CANADA), LE RÉSEAU DES SPORTS (RDS) INC., THE COMEDY NETWORK INC., 1163031 ONTARIO INC., (o.b.a. OUTDOOR LIFE NETWORK), CANWEST MEDIAWORKS INC., GLOBAL TELEVISION NETWORK QUEBEC LIMITED PARNERSHIP, PRIME TV, GENERAL PARTNERSHIP, CHUM LIMITED, CHUM OTTAWA INC., CHUM TELEVISION VANCOUVER INC., and PULSE24 GENERAL PARTNERSHIP (THE CORPORATE APPELLANTS)

Appellants

and

HER MAJESTY THE QUEEN

Respondent

and

BELL EXPRESSVU INC., ROGERS CABLE COMMUNICATIONS INC., COGECO CABLE CANADA INC. and COGECO CABLE QUEBEC INC.
and
SHAW COMMUNICATIONS INC., STAR CHOICE TELEVISION NETWORKS INC. and SHAW SATELLITE SERVICES INC.

Interveners

- -

A-590-06 and A-18-07

**VIDÉOTRON LTÉE, VIDÉOTRON (RÉGIONAL) LTÉE,
and CF CABLE TV INC. (VIDÉOTRON APPELLANTS)**

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on December 4 and 5, 2007.

Judgment delivered at Ottawa, Ontario, on April 28, 2008.

REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRING REASONS BY:	LÉTOURNEAU J.A.
CONCURRING REASONS BY:	PELLETIER J.A.

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REASONS FOR JUDGMENT

RYER J.A.

[1] For convenience, these reasons are organized under the following headings:

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[2] The Canadian broadcasting industry has been subject to federal regulation for over seventy years. Those wishing to participate in this industry have been, and continue to be, required to obtain broadcasting licences permitting them to do so and to pay licence fees in respect of those licences that have been granted to them. The basis for the determination of broadcasting licence fees has evolved over the years, not always to the satisfaction of licensees.

ISSUES

[3] The central issue in the cross-appeals by the Crown and one that underpins the appeals by the appellant association, the corporate appellants and the Videotron appellants is whether licence fees that are payable by licensed participants in the Canadian broadcasting system, pursuant to section 11 of the *Broadcasting Licence Fee Regulations, 1997*, SOR/97-144 (the "Regulations")

(the "Part II Fees"), are a tax. Mr. Justice Shore of the Federal Court ([2007] 4 F.C.R. 170, 2006 FC 1482) decided that they are a tax and, in accordance with the earlier decision of this Court in *Canadian Association of Broadcasters v. Canada* ([2006] F.C.J. No. 869, 2006 FCA 208) ("*CAB I*"), he declared that section 11 of the Regulations is *ultra vires* and that the Part II Fees imposed thereunder are invalid.

[4] In the cross-appeals, the Crown also appeals against the decision of the Federal Court to award costs against the Crown on a solicitor-client basis.

[5] In the appeals, the issues are whether the Federal Court erred in suspending, for a period of nine months, its declaration that the Part II Fees are a tax, in denying recovery of the Part II Fees that had been paid by the appellants in the years referred to in the statements of claim that were before the Federal Court and in not granting leave to make certain amendments to those statements of claim.

[6] The appeals and cross-appeals were consolidated pursuant to an order of Sharlow J.A. dated February 1, 2007.

[7] For the reasons that follow, I am unable to agree with the Federal Court that the Part II Fees are a tax. As well, I am of the view that the Federal Court erred when it awarded costs against the Crown on a solicitor-client basis. Accordingly, I would allow the cross-appeals. As a result, it will

be unnecessary for me to deal with any of the issues referred to in paragraph [5] that are raised in the appeals.

BACKGROUND

The Parties

[8] The Canadian Radio-television and Telecommunications Commission (the "Commission") is an independent public authority established under the *Canadian Radio-television and Telecommunications Commission Act*, R.S. 1985, c. C-22 (the "CRTC Act"). Pursuant to subsection 5(1) of the *Broadcasting Act*, S.C. 1991, c. 11 (the "Act"), the Commission has the authority to regulate and supervise all aspects of the Canadian broadcasting system, including the authority to grant licences ("licences"), within the meaning of subsection 2(1) of the Act, to those who wish to participate in that system.

[9] The appellant association is a professional industry association that represents a large number of past and present licence holders.

[10] Each of the corporate appellants is a member of the appellant association, is a holder of a licence and has paid the Part II Fees for one or more of the years since the Regulations came into effect.

[11] Each of the Videotron appellants is a holder of a licence and has paid Part II Fees for one or more of the years since the Regulations came into effect.

The Part I and II Fees

[12] Section 11 of the Act empowers the Commission to make regulations with respect to broadcasting licence fees. The relevant portions of that provision are as follows:

11.(1) The Commission may make regulations	11. 1) Le Conseil peut, par règlement :
(*a*) with the approval of the Treasury Board, establishing schedules of fees to be paid by licensees of any class;	*a*) avec l'approbation du Conseil du Trésor, fixer les tarifs des droits à acquitter par les titulaires de licences de toute catégorie;
(*b*) providing for the establishment of classes of licensees for the purposes of paragraph (*a*);	*b*) à cette fin, établir des catégories de titulaires de licences;
(*c*) providing for the payment of any fees payable by a licensee, including the time and manner of payment;	*c*) prévoir le paiement des droits à acquitter par les titulaires de licences, y compris les modalités de celui-ci;
(*d*) respecting the interest payable by a licensee in respect of any overdue fee; and	*d*) régir le paiement d'intérêt en cas de paiement tardif des droits;
(*e*) respecting such other matters as it deems necessary for the purposes of this section.	*e*) prendre toute autre mesure d'application du présent article qu'il estime nécessaire.
(2) Regulations made under paragraph (1)(*a*) may provide for fees to be calculated by reference to any criteria that the Commission deems appropriate, including by reference to	(2) Les règlements d'application de l'alinéa (1) *a*) peuvent prévoir le calcul des droits en fonction de certains critères que le Conseil juge indiqués notamment :
(*a*) the revenues of the licensees;	*a*) les revenus des titulaires de licences;
	b) la réalisation par ceux-ci des objectifs fixés par le

(*b*) the performance of the licensees in relation to objectives established by the Commission, including objectives for the broadcasting of Canadian programs; and

(*c*) the market served by the licensees.

(3) No regulations made under subsection (1) shall apply to the Corporation or to licensees carrying on programming undertakings on behalf of Her Majesty in right of a province.

(4) Fees payable by a licensee under this section and any interest thereon constitute a debt due to Her Majesty in right of Canada and may be recovered as such in any court of competent jurisdiction.

Conseil, y compris ceux qui concernent la radiodiffusion d'émissions canadiennes;

c) la clientèle desservie par ces titulaires.

(3) Les règlements pris en application du paragraphe (1) ne s'appliquent pas à la Société ou aux titulaires de licences d'exploitation — pour le compte de Sa Majesté du chef d'une province — d'entreprises de programmation.

(4) Les droits imposés au titre du présent article et l'intérêt sur ceux-ci constituent des créances de Sa Majesté du chef du Canada, dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

[13] In 1997, the basis for the determination of broadcasting licence fees changed when the Regulations came into effect on April 1 of that year. Under the new provisions, annual licence fees are split into two parts. Sections 7 to 10 of the Regulations provide for Part I licence fees (the "Part I Fees"), which represent each licensee's proportional share of the total regulatory costs incurred by the Commission in a given year. Section 11 of the Regulations provides for the Part II Fees, which represent 1.365% of each licensee's gross revenue from broadcasting activities in the year, subject to certain prescribed exemptions. The relevant portions of the Regulations are as follows:

7. The components of a Part I licence fee shall consist of

7. Les droits de licence de la partie I se composent :

(*a*) an initial amount calculated in accordance with subsection 8(1); and

(*b*) an annual adjustment amount calculated in accordance with subsection 8(2).

8. (1) The initial amount shall be calculated by the Commission using the formula

$$(A / B) \times C$$

where

A
is the licensee's fee revenues for the most recently completed return year, less that licensee's exemption level for that return year;

B
is the aggregate fee revenues for the most recently completed return year of all licensees whose fee revenues exceed the applicable exemption levels, less the aggregate exemption level for all those licensees for that return year; and

C
is the estimated total regulatory costs of the Commission for the current fiscal year as calculated in accordance with section 9.

(2) The annual adjustment amount shall be calculated by the Commission using the following formula

$$(A / B) \times D$$

a) d'un montant de base calculé conformément au paragraphe 8(1);

b) d'un rajustement annuel calculé conformément au paragraphe 8(2).

8. (1) Le Conseil calcule le montant de base au moyen de la formule suivante :

$$(A/B) \times C$$

où

A
représente l'excédent des recettes désignées du titulaire, pour la dernière année de rapport complète, sur sa franchise pour la même année;

B
l'excédent des recettes désignées de tous les titulaires dont les recettes désignées dépassent leur franchise, pour la dernière année de rapport complète, sur le total des franchises de ceux-ci pour la même année;

C
le coût total estimatif de la réglementation du Conseil pour l'exercice en cours, calculé conformément à l'article 9.

(2) Le Conseil calcule le rajustement annuel au moyen de la formule suivante :

$$(A/B) \times D$$

où

A
représente l'excédent des recettes

where

A
is the licensee's fee revenues for the most recently completed return year, less that licensee's exemption level for that return year;
B
is the aggregate fee revenues for the most recently completed return year of all licensees whose fee revenues exceed the applicable exemption levels, less the aggregate exemption level for all those licensees for that year; and
D
is the difference between the estimated total regulatory costs and the actual total regulatory costs of the Commission for the fiscal year as calculated in accordance with section 9.

(3) The annual adjustment amount referred to in subsection (2) shall be charged or credited to the licensee in the following year's invoice and shall not, in any case, result in a disbursement of monies on the part of the Commission.

9. (1) The estimated total regulatory costs of the Commission for the current fiscal year is the sum of the following amounts as set out in the Commission's Expenditure Plan published in Part III of *The Estimates of the Government of Canada*:

(*a*) the costs of the Commission's Broadcasting Activity; and

désignées du titulaire, pour la dernière année de rapport complète, sur sa franchise pour la même année;
B
l'excédent des recettes désignées de tous les titulaires dont les recettes désignées dépassent leur franchise, pour la dernière année de rapport complète, sur le total des franchises de ceux-ci pour la même année;
D
la différence entre le coût total estimatif et le coût total réel de la réglementation du Conseil, calculés conformément à l'article 9.

(3) Le rajustement annuel visé au paragraphe (2) est porté au débit ou au crédit du titulaire lors de la facturation de l'année suivante; il ne peut en aucun cas entraîner un remboursement de la part du Conseil.

9. (1) Le coût total estimatif de la réglementation du Conseil pour l'exercice en cours est la somme des montants suivants, figurant dans le plan de dépenses du Conseil publié dans la partie III du *Budget des dépenses du gouvernement du Canada*:

a) les frais de l'activité Radiodiffusion du Conseil;

b) la part, attribuable à l'activité Radiodiffusion du Conseil :

(i) des frais des activités administratives du

(*b*) the share that is attributable to the Commission's Broadcasting Activity of

(i) the costs of the Commission's administrative activities, and

(ii) the other costs that are taken into account to arrive at the net cost of the Commission's program, excluding the costs of regulating the broadcasting spectrum.

(2) The actual total regulatory costs of the Commission shall be calculated in accordance with subsection (1) using actual amounts.

11. A Part II licence fee shall consist of an annual licence fee, based on the fee revenue of a licensee for the return year that terminated in the current calendar year or during that portion of that return year in which the licensee held the licence to operate the undertaking, the amount of which shall be calculated as follows:

(*a*) for a distribution or a television undertaking, 1.365 per cent of the amount by which the fee revenue exceeds the applicable exemption level; and

(*b*) for a radio undertaking,

Conseil,

(ii) des autres coûts entrant dans le calcul du coût net du programme du Conseil, à l'exception des coûts de réglementation du spectre de la radiodiffusion.

(2) Le coût total réel de la réglementation du Conseil est calculé conformément au paragraphe (1) à l'aide des montants réels.

11. Les droits de licence de la partie II sont des droits de licence annuels, calculés en fonction des recettes désignées du titulaire pour l'année de rapport qui s'est terminée au cours de l'année civile courante, ou pour la partie de l'année de rapport au cours de laquelle le titulaire a détenu la licence d'exploitation de l'entreprise, et correspondent à :

a) dans le cas d'une entreprise de distribution ou d'une entreprise de télévision, 1,365 pour cent de l'excédent des recettes désignées sur la franchise applicable;

b) dans le cas d'une entreprise de radio :

(i) sous réserve du sous-alinéa (ii), 1,365 pour cent de l'excédent des recettes désignées sur la franchise applicable,

(ii) dans le cas d'une

(i) subject to subparagraph (ii), 1.365 per cent of the amount by which the fee revenue exceeds the applicable exemption level, and	entreprise de radio conjointe, 1,365 pour cent de l'excédent des recettes désignées combinées sur la franchise applicable.
(ii) in the case of a joint radio undertaking, 1.365 per cent of the amount by which the combined fee revenue exceeds the applicable exemption level.	

Commencement of the Actions

[14] Actions were commenced by the appellant association and the corporate appellants (T-2277-03) and the Videotron appellants (T-276-04) in which they sought, *inter alia*, declarations that section 11 of the Regulations is *ultra vires* and that those who have paid the Part II Fees pursuant to that provision are entitled to a return of the amounts that they have paid in the years specified in the actions. The actions were consolidated pursuant to an order of Prothonotary Tabib on August 1, 2006.

Preliminary Questions of Law

[15] The Crown brought a motion for a determination of two preliminary questions of law that were settled in *CAB I*. In that case, this Court determined that the power to make regulations with respect to licence fees that was granted to the Commission, pursuant to section 11 of the Act, does not authorize the Commission to impose a tax. The Court held that if the Part II Fees that the Commission sought to impose pursuant to section 11 of the Regulations are found to be a tax, then

that provision would be *ultra vires* the authority granted to the Commission under section 11 of the Act, and the Part II Fees would be invalid.

Leave to Amend Statements of Claim

[16] Motions were brought for leave to amend the statements of claim in T-2277-03 and T276-04 to expand the periods in respect of which the claimants sought to recover the Part II Fees that they have paid. These motions were denied by Shore J. in oral reasons that were delivered on November 20, 2006. The appeals in A-17-07 and A-18-07 were launched by the appellant association, the corporate appellants and the Videotron appellants from that decision.

The Agreed Statement of Facts

[17] The trial before the Federal Court of Canada proceeded on an Agreed Statement of Facts, the salient portions of which are described in the following paragraphs. Although described as agreed "facts", much of what was agreed upon constitutes interpretations of various provisions of the Act and the Regulations.

[18] Broadcasting, as defined in subsection 2(1) of the Act, cannot lawfully take place in Canada without a licence being issued by the Commission, unless an express exemption from the licensing requirements is obtained pursuant to subsection 9(4) of the Act.

[19] The Commission announced the adoption of the Regulations in Public Notice CRTC 1997-32 which states, in part:

> The proposed regulations were drafted by the Commission in response to the Treasury Board's decision to grant the Commission vote-netting authority for the broadcasting activity. As a result of this decision, the Commission will henceforth require that a portion of the licence fees be paid as of 1 April each year to finance the Commission's operating expenditures.
>
> The Commission's intent in drafting the proposed new regulations was to create a system that, in relation to the existing fee structure, would result in approximately the same amount of fees payable on both an industry-wide and individual undertaking basis over the period of the next three years, assuming that the Commission's approved funding level remains stable.
> […]
>
> The new Fee Regulations contain two key elements. The first is a revised fee structure, whereby each licensee subject to the regulations will remit to the Commission a Part I licence fee, payable on 1 April each year, and a Part II licence fee, payable on or before 30 November each year. The Part I fee is based on the broadcasting regulatory costs incurred each year by the Commission and other federal departments or agencies, excluding spectrum management costs; while the Part II fee amounts to 1.365% of a licensee's gross revenue in excess of an applicable exemption limit.
> […]
>
> The Commission is satisfied that the new Fee Regulations address the primary reason for their development, namely, to respond to the Treasury Board's decision granting the Commission vote-netting authority, while retaining a system that will generate an amount of revenue equivalent to that raised under the previous fee regulations.

[20] The purpose of the Part I Fees is to recover the regulatory and administrative costs of the Commission with respect to broadcasting.

[21] The amounts of the Part I Fees received by the Commission during the period from the date that the Regulations became effective to the end of the 2004-2005 period (the "Claims Period") are equal or approximately equal to the regulatory and administrative costs of the Commission during that period.

[22] During the Claims Period, the Commission received approximately $182 million as Part I Fees and $680 million as Part II Fees.

[23] Industry Canada manages all radio spectrum, including spectrum allocated for broadcasting (the “broadcasting spectrum”) and is responsible for the issuance of broadcasting certificates to licensees who use the broadcasting spectrum. Without both a licence and a broadcasting certificate (where the use of the broadcasting spectrum is required), broadcasting is unlawful. No fees are payable in respect of the issuance of broadcasting certificates.

[24] The costs incurred by Industry Canada with respect to its management of the broadcasting spectrum for a period which was slightly shorter than the Claims Period are approximately $77 million. No portion of the Part I Fees is applied towards the costs incurred by Industry Canada in relation to its management of the broadcasting spectrum.

THE DECISION OF THE FEDERAL COURT

[25] The Federal Court found that the Part II Fees are a tax and, in accordance with the decision of this Court in *CAB I*, declared section 11 of the Regulations to be *ultra vires* section 11 of the Act. However, it concluded that the corporate appellants and Videotron appellants are not entitled to recover any of the Part II Fees that they have paid. The Federal Court suspended the effect of its declaration of invalidity for nine months. Finally, it ordered the Crown to pay costs on a solicitor-client basis.

[26] In concluding that the Part II Fees are a tax, the Federal Court referred to the criteria that were set down by the Supreme Court of Canada in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 and *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134. At paragraph 98 of its decision, the Federal Court summarized its understanding of those factors.

> 98 The framework that the Supreme Court of Canada has said should be used to identify whether a levy is a tax is whether it is: 1) compulsory and enforceable by law; 2) imposed under the authority of the legislature; 3) levied by a public body; 4) intended for a public purpose, and has 5) no reasonable nexus between the quantum charged and the cost of the service provided or the regulatory scheme it is intended to support. (*Lawson*, above; *Eurig*, above at paras. 15 & 21; *Westbank*, above at para. 22)

[27] The Federal Court accepted without difficulty that the first three factors are satisfied. It determined that the Part II Fees are compulsory because subsection 11(4) of the Act provides that fees payable by a licensee and any interest thereon constitute a debt due to Her Majesty in right of Canada and may be recovered as such in any court of competent jurisdiction. Since the Part II Fees are imposed and collected in accordance with the Regulations purportedly made pursuant to section 11 of the Act, those fees were held to be imposed under the authority of the legislature. Finally, it held that the Part II Fees are levied by the Commission, a public body constituted under the CRTC Act.

[28] On the issue of whether the levy was intended for a public purpose, the Federal Court concluded that the Part II Fees are collected to raise revenue for general purposes because the fees are deposited into the Consolidated Reserve Fund and not “earmarked” for use to defray the costs of the general regulation of the broadcasting system or any component thereof.

[29] The Federal Court did not accept that the Part II Fees are used to finance a regulatory scheme. It rejected the Crown's argument that the regulatory scheme is the Canadian broadcasting system and that it is "manifest" that the costs of that scheme exceed the Part II Fees collected. According to the Federal Court, the Crown had failed to provide any evidence as to these costs. It determined that the only costs relating to any regulatory scheme in evidence before it were the Commission's costs relating to broadcasting activities, which are recovered by the Part I Fees, and possibly the costs incurred by Industry Canada in its management of the broadcasting spectrum, which were found to be much less than the Part II Fees that have been paid.

[30] With respect to the fifth factor that was referred to in paragraph 98 of its decision, the Federal Court went on to hold, citing *Eurig*, that a reasonable nexus exists where there is a close relationship between the amount of the licence fees and the cost of administering the corresponding regulatory regime. Applying this test to the facts before it, the Federal Court concluded at paragraph 114 that:

> There is no demonstrable connection between the quantum of Part II Licence fees collected and any associated regulatory scheme.

[31] The Federal Court rejected the Crown's argument that the Part II Fees could be regarded as payment for the privilege of broadcasting for commercial benefit. First, the Federal Court could not reconcile the Crown's justification for the Part II Fees with the fact that many broadcasters carry on business for commercial benefit without being required to pay the Part II Fees because either the amount of their revenues or the number of their subscribers is less than a minimum threshold.

Moreover, it found that the Crown had failed to produce any evidence that demonstrated any reasonable connection between the quantum of the Part II Fees and the value of the privilege. Even if it were assumed that such a privilege had value, the Federal Court accepted that the privilege had already been paid for by the licensees in numerous ways apart from the Part II Fees. As examples, it noted that the Commission imposes requirements on licensees to broadcast a minimum amount of Canadian content and to make contributions to the production of Canadian content. Finally, it held that the Act does not authorize the Commission to impose a licence fee for a privilege.

[32] The Federal Court rejected the Crown's argument that the decision of the Supreme Court of Canada in *Procureur général du Canada v. Compagnie de Publication La Presse, Ltée*, [1967] S.C.R. 60, is determinative of the validity of the Part II Fees. According to the Federal Court, the Exchequer Court's reasoning in *La Presse* ([1964] Ex. C.R. 627, 63 D.T.C. 1335) which was upheld by the Supreme Court of Canada, recognized the requirement for a nexus between the amount of the charge and the costs of the regulated activity, which nexus the Federal Court had ruled was not present in the case before it. The Federal Court went on to note that, in any event, since the legislation at issue in *La Presse* was ambiguous, the decision of the Supreme Court of Canada in *La Presse* could not be determinative of the outcome in the present case.

[33] The Federal Court also rejected the Crown's argument that *620 Connaught Ltd. v. Canada (Attorney General)*, 2006 FCA 252, [2007] 2 F.C.R. 446, supports the proposition that licensees may be charged a fee because they benefit from the privilege of holding a broadcasting licence. According to the Federal Court, the essence of the decision in *620 Connaught* is that where a

regulatory body is given the legislative authority to charge for a privilege, the benefit derived from the regulated commercial activity may enter into the equation to establish a nexus between the amount of the fees and the regulatory scheme. Since the Act does not expressly provide that a fee may be charged for a privilege, the Federal Court found that *620 Connaught* does not apply. Moreover, it observed that, unlike the Part II Fees, the fees charged in *620 Connaught* went directly back into a regulatory scheme.

[34] Finally, the Federal Court held that the decision in *Mount Cook National Park Board v. Mount Cook Motels*, [1972] N.Z.L.R. 481 (N.Z.C.A.), does not support the Crown's position that the benefit received by broadcasting licensees authorized a charge for a privilege. First, it found that *Mount Cook* only establishes that where a licence fee is charged for a privilege, it will not be a tax provided that the fee stays within the system to which it adheres. Furthermore, it held that the decision in *Mount Cook* supports the imposition of a reasonable fee, and it concluded that the Crown had failed to demonstrate that the Part II Fees are reasonable.

[35] The Federal Court awarded costs against the Crown on a solicitor-client basis notwithstanding that such costs were not requested by the appellant association, the corporate appellants and the Videotron appellants. In addition, that award of costs was made without permitting the Crown to make any submission on the matter.

ANALYSIS

[36] I propose to deal with the issues on the cross-appeals before considering the issues that are raised in the appeals. In the following portion of my reasons, the appellant association, the corporate appellants and the Videotron appellants are collectively referred to as the appellants.

ARE THE PART II FEES A TAX?

Standard of Review

[37] The standards of review on an appeal are set out in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. The *vires* of subordinate legislation is reviewed on a standard of correctness. However, it has already been determined in *CAB I* that if the Part II Fees are a tax, then section 11 of the Regulations is *ultra vires* section 11 of the Act. The issue that is now under consideration is whether the Part II Fees imposed under section 11 of the Regulations are a tax or regulatory charge. This is a question of mixed fact and law in respect of which the standard of review has been summarized by the Chief Justice of this Court in *Elders Grain Co. v. M/V Ralph Misener (The)*, 2005 FCA 139 at paragraph 12, as follows:

> 12 A determination that involves the application of a legal test to a set of facts is a question of mixed fact and law. That determination is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the legal test or its application, in which case the error may amount to an error of law: *Housen* at paragraph 37; *R. v. Buhay*, [2003] 1 S.C.R. 631 at paragraph 45. [Emphasis added.]

[38] For reasons that follow, I am of the view that the Federal Court mischaracterized the legal test to be applied to distinguish a tax from a regulatory charge, in the circumstances under

consideration, and that this mischaracterization constitutes an extricable error of law in respect of which a standard of correctness is applicable.

Distinguishing a Regulatory Charge from a Tax

[39] In *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 ("*620 Connaught II*"), Rothstein J. held that the annual business licence fee for the right to sell alcoholic beverages imposed on hotels, restaurants and bars in Jasper National Park is, in pith and substance, a regulatory charge and not a tax. In analysing whether a government levy is a tax or a regulatory charge, Rothstein J. summarized the task of the Court:

> 16 The task for the Court is to identify whether the fees paid by the appellants are, in pith and substance, a tax or a regulatory charge. The pith and substance of a levy is its dominant or most important characteristic. The dominant or most important characteristics are to be distinguished from its incidental features (P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 1, at pp. 433-36). The fees in this case have characteristics of both a tax and regulatory charges. The Court must ascertain which is dominant and which is incidental.
>
> 17 In the context of whether a government levy is a tax or a regulatory charge, it is the primary purpose of the law that is determinative. Although the law may have incidental effects, its primary purpose will determine whether it is a tax or a regulatory fee. In *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, Gonthier J. described the pith and substance of a government levy in terms of its primary purpose. At para. 30, he stated:
>
> > In all cases, a court should identify the primary aspect of the impugned levy... . Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. [Emphasis deleted.]

[40] The Part II Fees are not user fees, and no party has argued that they were. The sole question is whether, in pith and substance, the Part II Fees are a tax or a regulatory charge.

[41] While in *Lawson* the Supreme Court of Canada had identified the four characteristics of a tax, a fifth element was added to the test in *Westbank* to create the distinction between a tax and a regulatory charge. At paragraph 43 of *Westbank*, Gonthier J. summarized the five elements as follows:

> 43 … Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.

[42] The fifth element provides that even if the levy has all the other indicia of a tax, it will be a regulatory charge, and not a tax, if it is connected to a regulatory scheme. In *Westbank*, Gonthier J. established a two-step approach to determine if a governmental levy is connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme which involves a consideration of the following factors:

> 44 … To find a regulatory scheme, a court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. This list is not exhaustive.

[43] If a regulatory scheme is found to exist, Gonthier J. characterized the second step in his analysis in the following terms at paragraph 44:

> In order for a charge to be "connected" or "adhesive" to this regulatory scheme, the court must establish a relationship between the charge and the scheme itself. This will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour.

This passage informs of two situations in which a connection between a charge and a regulatory scheme will be shown to exist. The first situation is one in which the revenues generated by the charge are "tied to" the costs of the regulatory regime. The second is one in which the charges have a regulatory purpose.

[44] At paragraph 28 of his reasons in *620 Connaught II*, Rothstein J. summarized the teaching of *Westbank* as follows:

> 28 In summary, if there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme itself under step two, the pith and substance of the levy will be a regulatory charge and not a tax. In other words, the dominant features of the levy will be its regulatory characteristics. Therefore, the questions to ask are: (1) Have the appellants demonstrated that the levy has the attributes of a tax? and (2) Has the government demonstrated that the levy is connected to a regulatory scheme? To answer the first question, one must look to the indicia established in *Lawson*. To answer the second question, one must proceed with the two-step analysis in *Westbank*.

Misinterpretation of Westbank

[45] The decision of the Supreme Court of Canada in *620 Connaught II* was not released at the time of the decision of the Federal Court. However, in *620 Connaught II*, Rothstein J. affirmed that a levy that may be characterized as a regulatory charge pursuant to the test laid out in *Westbank* will not constitute a tax. Accordingly, in my view, the test for distinguishing a regulatory charge from a tax that should have been applied by the Federal Court is substantially the same as it was prior to the judgment in *620 Connaught II*.

[46] In rejecting the Crown's argument that the Part II Fees are regulatory charges, the Federal Court characterized the legal test with respect to the determination of what constitutes a tax in the following terms:

> 98 The framework that the Supreme Court of Canada has said should be used to identify whether a levy is a tax is whether it is: 1) compulsory and enforceable by law; 2) imposed under the authority of the legislature; 3) levied by a public body; 4) intended for a public purpose, and has 5) no reasonable nexus between the quantum charged and the cost of the service provided or the regulatory scheme it is intended to support. (*Lawson*, above; *Eurig*, above at paras. 15 & 21; *Westbank*, above at para. 22)

While the first four of these elements are the same as those described by Gonthier J. in paragraph 43 of *Westbank*, the fifth element, which is the key element for distinguishing a regulatory charge from a tax, is considerably different. As I read the fifth factor in paragraph 98 of the Federal Court's reasons, the Federal Court has determined that a particular levy will be a regulatory charge if there is a reasonable connection between the quantum of the levy and either the cost of a service provided or of the regulatory scheme in which the levy arises.

[47] The Federal Court expanded upon its interpretation of the fifth element at paragraph 113 of its reasons, stating;

> Regulatory schemes usually involve the collection and expenditure of funds for costs properly estimated. While courts will not require that the amounts collected correspond precisely with the cost of the scheme, there must be a demonstrable and reasonable connection between them. <u>If there is an insufficiently close relationship between the amount of the licence fee and the cost of administering the corresponding regulatory scheme, then the charge constitutes a form of taxation (*Eurig*, above, at paragraphs 15 and 21-22).</u> [Emphasis added.]

[48] In *Eurig*, the Supreme Court of Canada dealt with user fees, which Gonthier J. described in *Westbank* as a subset of regulatory charges. *Eurig* informs that a user fee will be valid only if it can be established that there is a connection between the quantum of the user fee and the cost of the service that is provided. However, as noted above, the Part II Fees are not user fees.

[49] In my view, the Federal Court has concluded that a levy, other than a user fee, will be a regulatory charge only if there is a reasonable nexus between the quantum of the levy and the cost of the regulatory scheme in which it arises. With respect, I am unable to agree with that interpretation. In paragraph 44 of his reasons, Gonthier J. held that when the revenues raised by a levy are "tied to" the costs of a regulatory scheme, the requisite nexus between the levy and the regulatory scheme will exist. However, he also went on to say that the requisite nexus will also exist when the levy has a regulatory purpose. It follows, in my view, that where a regulatory purpose for a levy has been established, the requisite nexus between that levy and the regulatory scheme in which it arises will nonetheless exist even if the quantum of the revenues raised by that levy exceeds the costs of the regulatory scheme in which that levy arises.

[50] Accordingly, with respect, I am of the view that the Federal Court mischaracterized the legal test, which was enunciated in *Westbank* and confirmed in *620 Connaught II*, that is to be applied in the determination of whether a government levy is a regulatory charge (other than a user fee) on the basis that it is connected to a regulatory scheme. In my view, this mischaracterization constitutes an extricable error of law that is reviewable on a standard of correctness. In light of this error, I will

provide my own interpretation of both aspects of that test and will then apply it to the facts of this case.

Scope and Application of Westbank and 620 Connaught II

[51] In providing my own interpretation and application of the test, I will first deal with the matter of whether the requisite regulatory connection has been established on the basis that the Part II Fees are "tied to" the costs of a regulatory scheme. Thereafter, I will deal with the matter of whether the requisite regulatory connection has been made on the basis that such fees have a regulatory purpose.

[52] At the outset, I would observe that a significant body of jurisprudence examining the scope of regulatory charges has not yet been developed. Accordingly, while the guidance that has been provided in *Westbank*, and more recently in *620 Connaught II*, is illuminating, it is not all encompassing. That said, *Westbank* and *620 Connaught II* inform that a charge that meets the first four characteristics of a tax that are described in paragraph 43 of *Westbank* will, nonetheless, escape characterization as a tax if that charge is connected to a regulatory scheme and accordingly is, in pith and substance, a regulatory charge.

[53] The determination of whether a charge is connected to a regulatory scheme presupposes the existence of a regulatory scheme. Paragraph 44 of the decision in *Westbank* contains a non-exhaustive list of four factors that will indicate the presence of a regulatory scheme. That paragraph concludes by providing two sets of circumstances (where the charge is "tied to" the costs of the

regulatory regime in which it arises or where the charge has a regulatory purpose) in which the requisite connection between the charge in question and a regulatory scheme will be demonstrated.

Identifying the Relevant Regulatory Scheme

[54] The determination of the existence of a regulatory scheme will be made by reference to the four *indicia* enumerated in paragraph 44 of *Westbank*. In *620 Connaught II*, Rothstein J. explained that the first three factors establish the existence of a regulatory scheme while the fourth factor establishes that the regulatory scheme is relevant to the person being regulated. While a consideration of these factors will be undertaken, in my view, one would be hard-pressed to find a clearer example of a comprehensive regulatory scheme than that which is embodied in the Act and the Regulations, which provide for the regulation and supervision of the entire broadcasting system.

[55] Subsection 3(1) of the Act declares a single broadcasting policy for Canada in statutory provisions encompassing twenty paragraphs. Moreover, subsection 3(2) of the Act further declares that the Canadian broadcasting system constitutes a single system and that the twenty objectives of the broadcasting policy that are enumerated in subsection 3(1) of the Act can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority. The broad scope of the regulatory oversight of the Canadian broadcasting system was noted by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, in which, at paragraph 47, Iacobucci J. stated:

> Canada's broadcast policy has a number of distinguishing features, and evinces a decidedly cultural orientation. It declares that the radio frequencies in Canada are public property, that

> Canadian ownership and control of the broadcasting system should be a base premise, and that the programming offered through the broadcasting system is "a public service essential to the maintenance and enhancement of national identity and cultural sovereignty". Sections 3(1)(*d*) and 3(1)(*t*) enumerate a number of specific developmental goals for, respectively, the broadcasting system as a whole and for distribution undertakings … in particular. Finally, s. 3(2) declares that "the Canadian broadcasting system constitutes a single system" best regulated and supervised "by a single independent public authority".

[56] Specifically contemplated as a significant contributor to the achievement of Canada's single broadcasting policy is the Canadian Broadcasting Corporation, the "national public broadcaster" mandated by paragraph 3(1)(l) of the Act to provide radio and television services incorporating a wide range of programming (spelled out in paragraph 3(1)(*m*) of the Act) that informs, enlightens and entertains.

[57] In my view, the first two *indicia* with respect to the presence of a regulatory scheme – a complete and detailed code of regulation and a regulatory purpose that affects behaviour – are clearly met. The Act and the Regulations extend regulatory oversight to the entire Canadian broadcasting system. The policy requirements contained in those detailed legislative provisions impose significant behavioural requirements upon those who are permitted, by virtue of the licences that they have requested, to participate in the Canadian broadcasting system.

[58] The third *indicium* – the presence of actual or properly estimated costs of the regulation – requires a more precise focus on the scope of the putative regulatory scheme. Otherwise, how could one quantify the actual or estimated costs of that which is regulated? Thus, the question becomes whether the costs that are to be considered under this *indicium* are the actual or estimated costs

incurred in the regulation and supervision of the entire Canadian broadcasting system or only the costs that relate to the administrative activities of the Commission in fulfilling its duties under the Act and of Industry Canada in managing the broadcasting spectrum.

[59] In my view, it is unduly restrictive to consider the regulatory scheme to be anything less than the entirety of that which is the subject of regulation under the Act and the Regulations. In other words, the regulatory scheme should be considered to encompass the activities that are being regulated, that is to say, the activities of all those participating in the Canadian broadcasting system. I am of the view that the regulatory scheme should not be limited to simply the activities of the entity or entities tasked with providing the mandated regulatory oversight, that is to say the Commission and Industry Canada, to the extent of its management of the broadcasting spectrum.

[60] Support for this broader view of the regulatory scheme may be found in the decision of the Exchequer Court in *La Presse*, which considered the validity of broadcasting licence fees that were prescribed by the Regulations authorized under the *Radio Act*, R.S.C. 1952, c. 233, legislation that has been supplanted by the Act. In that decision, the Court found that the costs that were to be considered were those of the Canadian Broadcasting Corporation, and not merely those of the administrators in the Governor's office or the Department of Transport, who were tasked with providing administrative services. At page 1340 of the decision, Dumoulin J. stated:

[*Not a tax*]

> For all these reasons, it seems obvious that the C.B.C. requires a substantial income in order to provide for the proper carrying out of its multiple tasks, an income which must increase at the same rate as the increasing necessities of operation. Section 3(1)(*a*) of the *Radio Act* has foreseen these unavoidable requirements by delegating to the Governor in

> Council the power, and this power without restrictions "to prescribe the tariff of fees to be paid for licences …"

[61] Accordingly, I am of the view that the costs which are to be considered in relation to this *indicium* must not be limited to only those costs that are incurred by the Commission and Industry Canada in fulfilling their administrative mandates in respect of the regulation of the Canadian broadcasting system. Rather, the costs that should be considered are all of the costs that are incurred in fulfilling the policy objectives and other requirements of the Act and the Regulations.

[62] The record before the Court adequately addresses the matter of the administrative costs incurred by the Commission and Industry Canada in fulfilling their respective administrative obligations. While the record is less complete with respect to the matter of other costs that were incurred in relation to the fulfillment of the regulatory policies mandated by the Act and the Regulations, any potential evidentiary deficiency in that regard is insufficient to warrant a conclusion that this *indicium* of the presence of a regulatory scheme is not present. The matter of the evidentiary burden with respect to the establishment of any such additional regulatory costs will be addressed in more detail later in these reasons.

[63] In my view, a consideration of these three *indicia* from *Westbank*, as further explained in *620 Connaught II*, establishes that the Canadian broadcasting system constitutes a regulatory scheme.

[64] The fourth *indicium* – the presence of a relationship between the regulation and the person subject to it – is readily demonstrable. This *indicium* contemplates that the regulated person either benefits from or causes the need for the regulation. Much could be said to demonstrate the presence of this *indicium*. However, in my view, it is sufficient to observe that access to the Canadian broadcasting system is limited and those with such access are shielded, to some considerable extent, from competition, especially from large foreign broadcasting concerns. The existence of this benefit is virtually uncontested, although the amount of the benefit undoubtedly varies with individual circumstances. This benefit is delivered by the Commission through the licensing provisions which are primarily found in sections 9 and 22 of the Act. Without a licence, participation in the Canadian broadcasting system is prohibited. Thus, the privilege of holding a licence is a benefit that is provided by the regulatory scheme that is embodied in the Act. That a broadcasting licence constitutes a privilege has been confirmed by the Supreme Court of Canada in *La Presse*, at page 76, where Abbott J. stated:

> In the present case, as I have stated, respondent held a valid licence to operate for the licence year April 1, 1960 to March 31, 1961, a private commercial broadcasting station and to use a certain specified radio frequency for that purpose. As Lord Atkin stated in *Shannon v. Lower Mainland Dairy Products Board* [[1938] A.C. 708 at 721, 2 W.W.R. 604, 4 D.L.R. 81.], such a licence merely involves a permission to trade, subject to compliance with certain conditions. In the present case, there was no contractual relationship between the Crown and respondent, and the latter had no vested or property right in the licence which it held. <u>What it did have was a privilege granted by the state, conferring authority to do something which without such permission would be illegal.</u> [Emphasis added.]

(See also the decision of Létourneau J.A. of this Court in *Genex Communications Inc. v. Canada*, 2005 FCA 283, at paragraph 43.)

[65] Since all four of the *Westbank indicia* are met, in my view, the Canadian broadcasting system, as embodied in the Act and the Regulations, qualifies as the relevant regulatory scheme.

Regulatory Connection – Cost Recovery

[66] As indicated in paragraph 44 of *Westbank*, a levy will be a regulatory charge if the revenues generated by the imposition of the levy are "tied to" the costs of the regulatory regime that has been identified. Accordingly, consideration must be given as to what is meant by "tied to".

[67] In my view, revenues generated by a levy may be said to be "tied to" the costs of an identified regulatory scheme where those revenues are approximately equal to or are less than the total costs of the regulatory scheme. Underpinning this interpretation is the premise that a charge that arises in a regulatory scheme that does not produce revenues of an amount in excess of the approximate amount of the costs that arise in that regulatory scheme cannot be considered to have been imposed for the purpose of raising revenues for general purposes and, therefore, cannot, in pith and substance, be a tax.

[68] Over time, the revenues generated by a particular levy and costs of a regulatory scheme will fluctuate, with the result that the levy may potentially generate revenues that exceed the costs of the regulatory scheme. The effect of a surplus in this context was considered in *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, 109 D.L.R. (4th) 46, as well as in *620 Connaught II*, wherein Rothstein J. stated, at paragraph 40:

> 40 However, as stated in *Allard*, at pp. 411-12, the government needs to be given some reasonable leeway with respect to the limit on fee revenue generation. While a significant or

> systematic surplus above the cost of the regulatory scheme would be inconsistent with a regulatory charge and would be a strong indication that the levy was in pith and substance a tax, a small or sporadic surplus would not, as long as there was a reasonable attempt to match the revenues from the fees with the cost associated with the regulatory scheme.

[69] The correlation between the revenues generated by a levy and the costs of the regulatory scheme in which those revenues arise may be said to exist along a spectrum. At one end of the spectrum, there will be a relatively clear and direct-linkage between such revenues and costs. Typically, this will arise as a result of efforts to estimate or budget the costs that are to be recovered and to select the characteristics of the levy such that it will produce revenues that are approximately equal to the amount of the anticipated costs. Cases in which this direct-linkage approach may be seen include *Allard*, in which a municipality made reasonable attempts to match volumetric gravel extraction permit fees to the costs of road repairs, and *Ontario Home Builders' Assn. v. York Region Board of Education*, [1996] 2 S.C.R. 929, 137 D.L.R. (4th) 449, in which an education development charge was imposed on land developers to recover specifically estimated school infrastructure costs.

[70] At the other end of the spectrum, there will be little direct-linkage between the amount of the revenue generated by the levy and the cost of the applicable regulatory scheme. In those instances, the apparent absence of any demonstrable effort to match in advance such revenues to the total costs of the regulatory scheme should not, in and of itself, result in a conclusion that those revenues are not, in fact, "tied to" the regulatory costs, provided that the amount of such revenues does not exceed the amount of such regulatory costs. This soft-linkage approach is likely to arise in situations in which the revenues that are generated by the levy could reasonably be anticipated to be materially less than the related regulatory costs. An example of this soft-linkage approach can be seen in *620*

Connaught II, in which it was determined that the licence fee revenues in question gave rise to approximately one-half of one percent of the costs of the regulatory scheme under consideration. However, the relationship of a particular levy that arises in a regulatory scheme to the overall costs incurred in that scheme is not necessarily the whole story. As Rothstein J. cautioned in *620 Connaught II*, consideration must also be given to revenues that may be generated from other levies that arise in the regulatory scheme. Otherwise, one will not be able to determine if overall revenues from levies that arise in the regulatory scheme exceed the total costs that arise in that scheme.

[71] In the circumstances under consideration, there is no evidence to suggest that the Commission or any other Crown agency undertook any type of budgetary planning in relation to the determination of the Part II Fees that is similar to the planning which appears in *Allard* and *Ontario Home Builders' Assn.* At most, the evidence suggests that the regulatory changes that gave rise to the Part I Fees and the Part II Fees were premised on an assumption that these new fees would raise approximately the same amount of revenue as the licence fee that they replaced. As such, I cannot conclude that the Part II Fees are "tied to" the costs incurred in the Canadian broadcasting system under the direct-linkage approach.

[72] The remaining question is whether the Part II Fees can be said to be "tied to" the costs incurred in the Canadian broadcasting system under the soft-linkage approach. That would be the case if, notwithstanding the absence of explicit budgetary planning, the costs incurred in the Canadian broadcasting system are less than the revenues generated by the Part II Fees for the period

under consideration and, as indicated by Rothstein J. in *620 Connaught II*, any other fees generated in the applicable regulatory scheme.

[73] The evidence demonstrates that in the Claims Period, the Commission received approximately $182 million as Part I Fees and approximately $680 million as Part II Fees. The evidence also shows that, in the Claims Period, the administrative costs incurred by the Commission were approximately equal to the Part I Fees received by the Commission in that period and that Industry Canada's costs in relation to the management of the broadcast system were approximately $77 million.

[74] The appellants contend that because the Part I Fees defray the administrative costs of the Commission, the only regulatory costs left for the Part II Fees to defray are those incurred by Industry Canada in relation to the administration of the broadcasting spectrum. The appellants correctly demonstrate that the Part II Fees generated in the Claims Period significantly exceed the relevant Industry Canada costs for that period. The appellants take the position that if other regulatory costs are to be considered, it is the obligation of the Crown to provide proof of any such costs, and the Crown has failed to do so. Thus, according to the appellants, the excess amount of the Part II Fees must be considered to be revenues raised for general purposes, thereby leading to the conclusion that the Part II Fees are, in pith and substance, a tax. In response, the Crown contends that the onus of proving that the amount of the Part II Fees exceeds the costs of the regulatory scheme lies with the appellants who have brought their actions for a declaration that those fees are invalid because they are, in pith and substance, a tax.

[75] With respect to the question of whether costs other than the administrative costs of the Commission and Industry Canada, in relation to its management of the broadcasting spectrum, may be considered, the contention of the appellants cannot be sustained. Having determined that the relevant regulatory scheme is the entire Canadian broadcasting system, it follows, in my view, that the relevant costs are those incurred in the regulation and supervision of the Canadian broadcasting system, including those costs that relate to the fulfillment of the policy objectives of the Act and the Regulations. Accordingly, in my view, costs other than those incurred by the Commission and Industry Canada in carrying out their administrative duties may properly be considered. The next question then becomes which of the parties has the obligation to demonstrate the existence or non-existence of any additional regulatory costs.

[76] In paragraph 28 of his reasons in *620 Connaught II*, Rothstein J. addresses the onus of proof issue by posing a question: “Has the Government demonstrated that the levy is connected to a regulatory scheme?”, thus indicating that the onus rests with the Crown.

[77] While the Crown did not present evidence with respect to additional regulatory costs, the Crown submits that the appropriations to the Canadian Broadcasting Corporation are a cost of the Canadian broadcasting system, the regulatory scheme in question, and that the Court need only look to the *Appropriation Acts* that were enacted in the Claims Period to ascertain that the amount of the appropriations to the Canadian Broadcasting Corporation during that period manifestly exceed the Part II Fee revenues for that period.

[78] I note that since the decision in *La Presse*, it has been recognized that the costs of the Canadian Broadcasting Corporation are of the type that arise in the pursuit of the policy objectives of the regulatory scheme in respect of which broadcasting licence fees are payable, including those objectives contemplated by paragraphs 3(1)(*l*) and (*m*) of the Act. Indeed, an earlier indication to the same effect is evident from the evidence of Nordicity Group Ltd. that was put before the Federal Court by the Crown. That evidence pointed out that paragraph 14(1)(*a*) of *The Canadian Broadcasting Act, 1936*, S.C. 1936, c. 24, which created the Canadian Broadcasting Corporation in 1936, specifically contemplated that licence fees received in respect of private receiving licences and private station broadcasting licences, net of related administrative costs, would be used to finance a portion of the costs of the Canadian Broadcasting Corporation.

[79] As indicated by the Crown, governmental appropriations to the Canadian Broadcasting Corporation are a matter of public record, as they appear in the *Appropriation Acts*. While it would have been helpful if this material had been put into the record, I have ascertained, from a review of those Acts that pertain to the Claims Period, that appropriations in excess of $7 billion have been provided by the Government to the Canadian Broadcasting Corporation. (See *Appropriation Act No. 2, 1997-98*, S.C. 1997, c. 35, *Appropriation Act No. 2, 1998-99*, S.C. 1998, c. 28, *Appropriation Act No. 4, 1998-99*, S.C. 1998, c. 40, *Appropriation Act No. 2, 1999-2000*, S.C. 1999, c. 30, *Appropriation Act No. 2, 2000-2001*, S.C. 2000, c. 18, *Appropriation Act No. 2, 2001-2002*, S.C. 2001, c. 24, *Appropriation Act No. 3, 2001-2002*, S.C,. 2001, c. 39, *Appropriation Act No. 2, 2002-2003*, S.C. 2002, c. 21, *Appropriation Act No. 4, 2002-2003*, S.C. 2003, c. 3, *Appropriation Act No.*

2, 2003-2004, S.C. 2003, c. 13, *Appropriation Act No. 3, 2003-2004*, S.C. 2003, c. 25, *Appropriation Act No. 4, 2003-2004*, S.C. 2004, c. 5, *Appropriation Act No. 2, 2004-2005*, S.C. 2004, c. 27.) As noted earlier, the total Part II Fees that were received by the Commission in the Claims Period is approximately $680 million.

[80] The appellants contend that "the government's subsidization of the C.B.C." should not be regarded as a regulatory cost. They argue that this is so because the Canadian Broadcasting Corporation is not required to pay Part II Fees and is, in many instances, in competition with private broadcasting licensees. With respect, these contentions cannot be accepted because, as previously noted, they are in conflict with the conclusion of the Exchequer Court in *La Presse* that the costs of the Canadian Broadcasting Corporation were properly characterized as regulatory costs. In my view, that conclusion remains valid.

[81] The appellants further contend that the revenues generated from the Part II Fees are deposited into the Consolidated Revenue Fund and do not go into a special purpose account, with the result that the monies generated from the Part II Fees are not traceable to any regulatory cost, including the appropriations to the Canadian Broadcasting Corporation. For that reason, the appellants argue, the amounts appropriated by the Government in favour of the Canadian Broadcasting Corporation cannot be considered to be regulatory costs that are partially defrayed by the Part II Fees.

[82] In my view, the argument that the Part II Fees must be specifically traceable to regulatory costs incurred in a regulatory scheme cannot be accepted. It is sufficient that the Part II Fees, which arise in the regulatory scheme embodied in the Act and the Regulations, are deposited into the Consolidated Revenue Fund and that costs of an equivalent or higher amount, which are incurred in that regulatory scheme, such as appropriations to the Canadian Broadcasting Corporation, are withdrawn from the Consolidated Revenue Fund. Imposing a requirement that the Part II Fees be deposited into, and the regulatory costs of the Canadian broadcasting system be paid out of, a special purpose account before those fees can be said to be "tied to" the costs of that regulatory scheme, would be unduly formalistic and impractical and therefore, cannot be accepted.

[83] In my view, the Canadian Broadcasting Corporation has been recognized, at least since the time of *La Presse*, as an integral participant in the attainment of the policy objectives of the regulatory scheme that is embodied in the Act. It follows that appropriations to the Canadian Broadcasting Corporation in the Claims Period may reasonably be considered to be regulatory costs. Since the revenues generated from the Part II Fees are considerably less than these particular regulatory costs, it is obvious that those revenues are less than the total costs of the regulatory scheme in which those revenues arise.

[84] The last aspect of the issue of whether the levy in question is "tied to" the costs of the regulatory scheme is whether it has been satisfactorily demonstrated that revenues from other levies that arise in the Canadian broadcasting system, together with those that are generated by the Part I Fees and the Part II Fees, do not exceed the total costs that arise in that regulatory scheme.

[85] There was no suggestion from the parties that any other levies of any kind – be they potential taxes or regulatory charges – were relevant to the issues that came before this Court. Moreover, as a practical matter, it would appear that the quantum of revenues from any such additional levies would have to exceed $6 billion in the Claims Period before the aggregate of the revenues from the Part I Fees, the Part II Fees and any such additional levies could potentially exceed the costs(including the appropriations to the Canadian Broadcasting Corporation) that have been shown to have arisen in the Claims Period. Accordingly, I am prepared to infer from the lack of any argument from any party in this appeal as to the existence of any such additional types of revenue generating levies, that no additional revenues need to be considered, especially revenues approximating $6 billion in the Claims Period, in the determination of whether the Part II Fees are "tied to" the costs of the Canadian broadcasting system under the soft-linkage approach. It follows, in my view, that the Part II Fees are less than the costs of the Canadian broadcasting system, as determined above, and as such, those fees may be said to be connected to that regulatory scheme. Accordingly, the Part II Fees are, in pith and substance, a regulatory charge and not a tax.

[86] In the event that I am wrong in my conclusion that the Part II Fees are "tied to" the costs of a regulatory scheme, those fees will nonetheless constitute regulatory charges if they are otherwise connected to a regulatory scheme. Accordingly, a consideration of that issue will be undertaken.

Regulatory Connection – Regulatory Purpose

[87] In accordance with paragraph 44 of *Westbank*, the Part II Fees will be connected to a regulatory scheme, and thereby constitute a regulatory charge, if the Part II Fees have a regulatory purpose. This proposition is consistent with the majority view of the Supreme Court of Canada in *Re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004 at 1070, which was expressed as follows:

> If, on the other hand, the federal government imposes a levy primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme, … then the levy is not in pith and substance "taxation"...

[88] The appellants contend that because the Part II Fees exceed the costs of the regulatory scheme that are not defrayed by the Part I Fees, the Part II Fees must be viewed as having been imposed for the purpose of raising general revenues and not for any regulatory purpose.

[89] The Crown rejects this argument and offers a more nuanced explanation of the purpose for the Part II Fees that is consistent with the observation of Rothstein J. at paragraph 20 of *620 Connaught II*, that regulatory charges "are normally imposed in relation to rights or privileges awarded or granted by the government". My understanding of the Crown's position is that the Part II Fees represent payment for the grant of the privilege of operating in the Canadian broadcasting system that is partially protected from full-blown competition by the Commission through its licensing function, an integral component of the regulatory scheme embodied in the Act. By limiting the number of licences that are issued, participation in the Canadian broadcasting system is correspondingly limited. Thus, the receipt of a licence constitutes a material benefit to each entity to whom a licence is granted. It follows, according to the Crown, that the Part II Fees have a regulatory

purpose of ensuring that those deriving this benefit are required to pay more than the nominal amount for it.

[90] The appellants do not contend that licences have no value to licensees. Instead, they argue that the Commission requires express legislative authority to impose fees for or in respect of the privilege or benefit that a licensee receives as a result of the grant of a licence. The appellants also contend that even if the Commission has the authority to impose licence fees for or in respect of such a privilege or benefit, it is incumbent upon the Commission to demonstrate that the amounts charged approximate the value of the privilege or benefit, and that the Commission has failed to do so.

[91] In my view, the appellants' arguments cannot be accepted. The language of section 11 of the Act specifies that licence fees may be calculated by reference to *any criteria*. This broad language provides sufficient authority to the Commission to charge licence fees for or in respect of the privilege or benefit that a licensee receives as a result of the grant of a licence. It is not incumbent upon the Commission to establish the value of the privilege or benefit that flows from the grant of licences by the Commission. Such a requirement would impose a significant and unnecessary burden upon the Commission since the value of the privilege or benefit would, in all likelihood, vary from licensee to licensee. In my view, a revenue based licence fee, as specifically sanctioned by paragraph 11(2)(*a*) of the Act, may be seen as a reasonable proxy for the value of the privilege or benefit that a licensee receives as a result of the grant of a licence since the amount of the licence fee will increase or decrease as the revenues of the licensee increase or decrease.

[92] In my view, the licensing function of the Commission is an essential element of the regulatory scheme embodied in the Act and the Regulations. In carrying out that function, the Commission is empowered to confer material benefits on successful applicants for licences. Those benefits are in no small part due to the restricted levels of competition in the Canadian broadcasting industry. In granting the benefits that flow from the privilege of holding a licence, the Commission is, and must be, aware that a consequence of the restriction on the level of competition in that industry is likely to be that licensees will be able to derive higher revenues than they would if full-blown competition in that industry was permitted. It follows, in my view, that the Commission has a duty to ensure that the valuable benefit of a licence is not "given away" to licensees.

[93] This point was also made by the New Zealand Court of Appeal in *Mount Cook* where Woodhouse J. stated, at page 487:

> In the second place, irrespective of rights vested in the Board by virtue of ownership, it is given the power to grant a specific person the right to enjoy in a very restricted field of competition, a trading privilege. I see no reason at all then, why the Board should not charge a licence fee for this privilege which will return to it a profit to add to its general revenue. If this were not so, then a rather odd result follows, for on the view which found favour with Wilson J., the Board would be obliged virtually to make a gift of the trading privilege to some selected person… [Emphasis added.]

[94] With respect, I too would find it "a rather odd result" if the appellants were to receive a virtual gift of a right to operate in a "very restricted field of competition". In my view, the Part II Fees serve a regulatory purpose by ensuring that licensees are required to make payments for the

privilege of operating in an industry that is protected by the regulatory scheme from the rigours of full-blown competition.

[95] The appellants then contend that by virtue of other conditions that are imposed on their licences, they have essentially paid for this benefit. In response, the Crown points to other benefits that are made available to licensees. Such benefits include income tax measures that encourage advertising in Canada, direct government funding in respect of certain Canadian television programming and simultaneous substitution of Canadian commercials over those of foreign broadcasters of television programs that are simultaneously broadcast by licensees. In my view, the fact that other benefits may be provided to, and other costs may be incurred by, licensees are matters that may well go to the overall adequacy of the consideration payable and receivable by licensees in respect of the application for and the receipt of a grant of their licences. These considerations do not, in my view, detract from my conclusion that the Part II Fees serve a regulatory purpose. I would only observe that the marketplace is likely to be the appropriate venue for the adjudication of this question of adequacy. By that I mean that if in any given instance, a licensee concludes that the amount of the Part II Fees that are payable by it makes its continued participation in the Canadian broadcasting system unsustainable, then withdrawal therefrom may be the consequence that flows from such a conclusion.

[96] Having concluded that the Part II Fees have a regulatory purpose, as outlined above, it follows, in my view, that those charges are connected to the regulatory scheme embodied in the Act

and the Regulations. Accordingly, I am of the view that the Part II Fees are, in pith and substance, a regulatory charge and not a tax.

SOLICITOR-CLIENT COSTS

[97] The only issue remaining in the cross-appeals is the appropriateness of the Federal Court's award of solicitor-client costs against the Crown that was made by the Federal Court. The award of costs is governed by Rule 400 of the *Federal Courts Rules*. The Court has full discretion over costs, including an award of solicitor-client costs. However, in *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405, 2002 SCC 13, the Supreme Court of Canada held that an award of solicitor-client costs is exceptional and should generally be awarded when a party has displayed reprehensible, scandalous or outrageous conduct.

[98] Moreover, in *Finch v. Canada*, 2002 FCA 194, 291 N.R. 376, Noël J.A. held that it was incumbent upon the judge to give the parties an opportunity to be heard before making an award of solicitor-client costs. In the present case, no submissions on costs were requested by the Federal Court before the award was made. Indeed, no solicitor-client costs were even requested by any party.

[99] At the hearing, counsel for the appellants acknowledged that the Crown had not displayed any reprehensible, scandalous or outrageous conduct and did not oppose the cross-appeals on this matter. It is surprising to me that such an award was made by the Federal Court, especially without

submissions from the parties on the matter. In my view, nothing in the record justifies the award of solicitor-client costs that was made. Accordingly, I would allow the cross-appeals on this issue.

DISPOSITION

[100] For the foregoing reasons, I would dismiss each appeal with costs to the respondent, limited in relation to the hearing before us to one set of costs, as the appeals were held together.

[101] I would allow the cross-appeals with costs to the respondent and set aside the decision of the Federal Court. Proceeding to render the judgment that should have been rendered, I would declare that section 11 of the Regulations is *intra vires* and that the Part II Fees are not a tax. I would dismiss the plaintiffs' actions with costs to the respondent.

"C. Michael Ryer"

J.A.

LÉTOURNEAU J.A. (Concurring)

[102] I have had the benefit of reading the reasons prepared by my colleagues, Justice Ryer and Justice Pelletier.

[103] I agree with Justice Ryer that we should dispose of the appeal as he suggests. However, when a regulatory scheme and a regulatory purpose exist and a charge is levied for a benefit or a privilege as in this case, there is, in my respectful view, no need for a reasonable nexus between, or a linkage to, the quantum of the levy and the costs of the regulatory scheme, whatever epithet or qualifier, i.e. direct, indirect, soft or hard, may be given to that linkage. Should it happen that levies for broadcasting licenses are too high, this competitive market will take care of itself and the forces at play are likely to exert an adequate control on over-enthusiastic regulators.

[104] I am comforted in this position by the approach taken by Justice Pelletier with respect to his views as to why this is not a tax. As he points out, no one here is forced to pay the levy unless he seeks the privilege of obtaining and exploiting a broadcasting license. There is not in this scheme the element of compulsion which characterizes a tax. We are dealing with free commercial enterprises which are seeking to make profits and which may or may not find their financial interests in exploiting a privilege that they have solicited. I fail to see how the charge for the license in such a case can be a tax.

[105] If I am wrong in my approach and there has to be, under the existing jurisprudence, a link between the levy and the costs of the regulatory scheme to avoid the levy from being labeled “a tax”, then I agree with Justice Ryer that the Part II fees are less than the costs of the Canadian broadcasting system.

“Gilles Létourneau”

J.A.

PELLETIER J.A. (Concurring)

[106] I am in agreement with the disposition of this matter proposed by my colleague, but I come to my position on more fundamental grounds.

[107] The legal basis for the appellants' complaint is section 53 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, which provides as follows:

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.	53. Tout bill ayant pour but l'appropriation d'une portion quelconque du revenu public, ou la création de taxes ou d'impôts, devra originer dans la Chambre des Communes.

[108] In *Eurig Estate (Re)*, [1988] 2 S.C.R. 565, the Supreme Court commented on the principle which underpins section 53:

> 30. In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.

[109] Section 53 is about democratic accountability. Its function is to ensure that only those who are politically accountable to the electorate are authorized to impose a compulsory levy on that electorate. It does not offend any notion of "no taxation without representation" for a government to make available to those who are prepared to pay for it, a property, a commercial right or a licence to do something which can only lawfully be done by a licence holder. While such transactions are

capable of raising issues of accountability for public property, there is no issue of *democratic* accountability where citizens acquire property or commercial rights from the government in exchange for money.

[110] There is admittedly a certain circularity about this since it is the government which decides which activities require a licence and which do not. Notwithstanding this circularity, the fact remains that where the government grants a licence, or disposes of property or a commercial right to a person for a price, there is no taking of property by compulsion of law. There is simply a commercial exchange. And because there is no deprivation of property by compulsion of law, the question of democratic accountability does not arise. Money voluntarily paid to the government in exchange for a commercial right or for property is not a tax.

[111] In my view, it is completely immaterial whether the House of Commons, the Governor in Council, or a Minister of the Crown acting under delegated authority sets the fees to be paid for broadcasting licences. The fact remains that in return for payment of the fees, the payor acquires (or maintains) the right to engage in a highly regulated, highly sheltered industry with a significant potential for economic gain. No one is bound to acquire a licence; those who feel the fees are too high are free to go into some other line of business, or to sell their licence on such terms as the regulatory scheme permits.

[112] Clearly, in the infinite variety of facts which are thrown up in the course of events, there will be cases where it is not so clear if a transaction is voluntary or compulsory (in either a legal

or a practical sense), or if the right or thing is in fact a thing of value. It is not necessary to anticipate those cases in order to dispose of this one. The jurisprudence in this area, which my colleague has carefully applied to the case at hand, has made this subject enormously complex by intertwining issues of federalism (inter-jurisdictional immunity from taxation) and democratic accountability. Each of these issues raises distinct lines of inquiry which do not necessarily emerge in the current jurisprudence. The effect on one level of government of taxation by another level of government on the functioning of a federal state is a different question from that of the democratic legitimacy of certain forms of transfer of wealth from citizens to the state. The characteristics which might make a charge inimical to federalism would not necessarily make it illegitimate on democratic grounds.

[113] My colleague has correctly stated and applied the current law to the facts of this case. Nothing in the jurisprudence precludes the reasoning by which I have come to the same conclusion as him as to the disposition of this appeal.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-591-06 and A-17-07
STYLE OF CAUSE:	CANADIAN ASSOCIATION OF BROADCASTERS et al. v. HER MAJESTY THE QUEEN et al.
PLACE OF HEARING:	Ottawa, Ontario
DATES OF HEARING:	December 4 and 5, 2007
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRING REASONS BY:	LÉTOURNEAU J.A.
CONCURRING REASONS BY:	PELLETIER J.A.
DATED:	April 28, 2008

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