In The Supreme Court of Bermuda

CIVIL JURISDICTION
2008: No. 305

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE CABLE TELEVISION SERVICE REGULATIONS 1987

BETWEEN:

BERMUDA CABLEVISION LIMITED

Applicant

- and -

THE DEPARTMENT OF TELECOMMUNICATIONS

Respondent

Date of Hearing: 18, 19 & 20 December 2008
Date of Judgment: 9 January 2009

Narinder Hargun & Ben Adamson of Conyers, Dill & Pearman for the Applicant;
Melvin Douglas of the Attorney General's Chambers for the Respondent;
Larry Mussenden & Mina Matin of Attride-Stirling & Woloniecki for the Telecommunications Commission; and
Eugene Johnston of Trott & Duncan for the Bermuda Broadcasting Company Ltd

JUDGMENT

INTRODUCTION

1. This matter comes before me on the application of Bermuda Cablevision Limited ('Cablevision') seeking judicial review of an apparent decision of the acting Director of Telecommunications, which was conveyed to them by letter of 2nd December 2008. That letter directed them not to cease to carry Channels 7 and 9, which are dedicated to the programming of the Bermuda Broadcasting Company Ltd ('ZBM[1]'). The remedy that

[1] I have used the station designation of channel 9 as a shorthand for the Bermuda Broadcasting Company Ltd rather than the acronym 'BBC', as the latter would invite confusion with the British Broadcasting Corporation, whose news programme is carried by both Cablevision and ZBM.

Cablevision seeks is a declaration that it is, as a matter of law, "not required by the Regulations or Statute for prior approval to cease the retransmission of channels 7 & 9."

2. Cablevision is the principal provider of cable television services in Bermuda. ZBM operates two broadcast television channels, but until now those channels have also been carried on Cablevision's system, essentially free of charge to either side. Historically that arrangement derived from regulation 12 of the Cable Television Service Regulations 1987 ('the Regulations')[2]. However, regulation 12 was revoked and replaced with effect from 10th July 2008[3]. The new regulation 12 introduced a radically different regime for the retransmission of broadcast stations. There is, however, a difference of opinion between the parties as to the meaning and effect of the new regime, and that is in part what this application is about.

3. The grounds upon which relief is sought are as follows:

> "The Cable Television Service Regulations 1987, and in particular Regulation 12 thereof, provide detailed and specific provision, and a complete code, for the manner in which cable operators should react to an election by a local broadcaster for its programming to be carried on a retransmission consent basis.
>
> The Department of Telecommunications' decision that, in addition to following the process set out in the Regulations, Cablevision must obtain the consent of the Telecommunications Commission is wrong in law and based upon a misunderstanding of the statutory regime.
>
> The Applicant seeks a declaration as to the proper interpretation of the Regulations and the Act.

4. Because this application is brought at an early stage, I think it particularly important to understand, and limit, the breadth of the relief sought. That has to be done by reference to the decision being challenged. The material part of the Acting Director's letter of 2nd December reads:

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[2] These Regulations are made under the powers conferred by section 59 of the Telecommunications Act 1986.

[3] See the Cable Television Service Amendment Regulations 2008, which were made on 10th July 2008 and apparently came into effect on that date

> "As a 'Specified Carrier', BCV (*i.e. Cablevision*) must first obtain a direction/decision from the Commission before introducing any new service or varying the rates and charges for any existing service.
>
> "Finally, we draw your attention to section 21(1)(i) of the Act which states it is the duty of every carrier "to maintain existing services unless permitted by the Commission to discontinue such services." As a result, BCV must not remove channels 7 and 9 as advertised in your articles"

I consider, therefore, that this application is strictly limited to the two points raised in that letter namely (i) the application of the 'Specified Carrier' provisions, and (ii) the application of section 21(1)(i) of the Telecommunications Act 1986 ('the Act'). In fact both those questions turn on the same point, namely what is meant by "telecommunication service".

JURISDICTION

5. The Commission and BBC take the preliminary point that there is no justiciable decision. However, I think that the Acting Director's letter does amount to a decision. It certainly purports to lay down the law, and to tell Cablevision how to proceed. I think therefore that it is open to review.

6. It is also said that the Court should not entertain this dispute at this stage, as the Commission is seized of it, or that, alternatively, the Commission hearing provides Cablevision with an alternative remedy for any complaint that Cablevision may have. Cablevision say that the issues raised by its application are pure points of law, which are best decided by the Court at this stage, and that in any event the Commission hearing is not strictly an appeal against the order of the Acting Director contained in the letter of 2nd December. On the first point they rely on the following statement of the law in "Commercial Judicial Review", Philip Engelman, Sweet & Maxwell 2001, at para. 16-034

> "Where there is a statutory appeal route Judicial Review will be allowed, according to the Court of Appeal where:
>
> (i) Judicial Review is faster (quaere, much) than the alternative route;

(ii) Judicial Review is more convenient;
(iii) where the matter does not depend upon some particular or technical knowledge available to the appellate body."

7. The textbook also quotes the following statement by Widgery CJ in R v Hillingdon LBC ex p. Royco Homes Ltd [1974] QB 720, at 728:

> "An application for certiorari has, however, advantages; that it is speedier and cheaper than the other methods, and in a proper case therefore it may be right to allow it to be used in preference to them. I would, however, define a proper case as one where the decision in question is liable to be upset as a matter of law because on its fact it is clearly made without jurisdiction or in consequence of an error of law. Given those facts, I can well see that it may be more efficient, cheaper and quicker to proceed by certiorari, and in those cases when they arise it seems to me proper that the remedy should be available."

8. It seems to me that this case is precisely within those statements of the law. The question raised by the application is a purely legal one[4], and the form of relief sought is simply a declaration as to the law. It involves no consideration of public policy[5], beyond the correct interpretation of the law. In particular these proceedings are not concerned with the question whether or not it is fair, right or proper that Cablevision should or should not carry ZBM's programmes, nor are they concerned with whether ZBM should be paid if Cablevision does carry its programmes.

9. One final point on this is that, at the end of the day, there is an appeal to the Supreme Court on any point of law or mixed fact and law: see section 60(1) of the Act. The matter is, therefore, likely to end up in the Supreme Court at the end of the day in any event. In all of these circumstances I consider that it is appropriate for this Court to consider this narrow legal issue at this time.

THE OLD SCHEME

10. The old version of regulation 12 provided as follows:

[4] See the grounds on which relief is sought, which are set out in paragraph 3 above.
[5] Where matters of policy are concerned it would, of course, usually be appropriate for the court to defer to the judgment of the Commission save for cases of Wednesbury irrationality.

"**Local television broadcast programmes**

12 (1) A licensee shall carry on the System, free of charge, all television programmes broadcast by a broadcasting radio station licensed in Bermuda.

(2) No licensee of a broadcasting radio station licensed in Bermuda shall knowingly and willfully impede or prevent the licensee from carrying the signal of such station or [*sic*[6]] the channels of the System.

(3) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art).

(4) the signal shall, on the request of a licensee of a broadcasting radio station licensed in Bermuda, be carried by the System on the channel number on which the broadcasting radio station is transmitting, except where technically unfeasible."

11. In simple language, the old scheme of things was that Cablevision was required to carry all broadcast television, whether it wanted to or not, and whether the broadcaster wanted it to do so or not. No payment was required to or by either side. It was also a consequence of the mandatory nature of the scheme that Cablevision was protected from any claim for copyright infringement in respect of the re-transmitted material: this followed from the terms of sections 70 and 99 of the Copyright & Designs Act 2004.

THE NEW SCHEME

12. The new version of regulation 12 changed all that. It now provides as follows:

"Local television programmes

12 (1) A licensee may carry on the System television programmes broadcast by a broadcasting radio station licensed in Bermuda.

(2) A broadcasting radio station shall elect for every period of three years commencing 1 November 2008 (in these Regulations referred to as the "election period") whether they wish their television programmes to be carried on a "must carry" or a "retransmission consent" basis.

(3) A broadcasting radio station must make its election for the first election period before 1 November 2008, and must make its election for each subsequent election period at least four months prior to the end of the then current election period.

[6] This 'or' appears to be a typographical error for 'on'.

(4) If "must carry" is elected, a licensee shall carry on the System, free of charge, all television programmes broadcast by a broadcasting radio station.

(5) If "retransmission consent" is elected, a licensee must, within 30 days, confirm whether or not they intend to carry the television programmes of a broadcasting radio station.

(6) Where "retransmission consent" is elected under paragraph (5) and a licensee chooses not to carry the television programmes they must within fourteen days inform the public via the public printed media and by direct notice to their customers and must also within that fourteen day period file revised tariff rates with the Commission for the programme tier in which the television programmes will no longer be available.

(7) Where "retransmission consent" is elected under paragraph (5) and a licensee chooses to carry the television programmes on a "retransmission consent" basis and the parties are not able to reach a commercial agreement within sixty days, then either party may refer the matter to the Commission for determination.

(8) The Commission shall, in not more than sixty days or such longer period as the Minister may allow, conclude its deliberations and forward a decision to the parties.

(9) The date of implementation of any new agreement shall be the day following the expiration of the previous election period.

(10) If either party is aggrieved by the decision of the Commission, they may appeal to the Minister in accordance with the procedures outlined under section 25 of the Act.

(11) During an election period in which a licensee has elected "must carry" or "retransmission consent" —

(a) neither party shall cause the television programmes of the broadcasting radio station to be unavailable on a licensee's System without the express permission of the Minister;

(b) television programmes shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art); and

(c) television programmes shall, at the request of a licensee of a broadcasting radio station licensed in Bermuda, be carried by the System on the channel number on which the broadcasting radio station is transmitting, except where technically not feasible.

(12) Where television programmes are carried by a System pursuant to this regulation, the programmes broadcast shall be carried in full, without deletion or alteration of any portion.".

13. The new version of regulation 12 clearly establishes two possible regimes between which a broadcasting station can choose –

(i) a broadcaster can choose 'must carry' in which case the cable service must retransmit the broadcast programmes on its cable system free of charge. Save for the element of choice, that is essentially the old system. Under this option, there is no provision for the broadcaster to require payment from the cable service.

(ii) the alternative is that the broadcaster can opt for the 'retransmission consent' basis. That allows the broadcaster to charge a cable service for its programmes, but only if that cable service chooses to carry them. Under the new scheme, a cable service can choose not to carry the broadcast station's programming at all.

14. I consider it plain and obvious that that regulation only mandates retransmission if the 'must carry' option is chosen by the broadcast station. If the broadcast station instead elects for 'retransmission consent' then the cable service has a choice either to carry the signal or not to carry it: see reg. (5). If the cable service chooses to carry the signal, but the parties cannot reach a commercial agreement on the terms (such as the fee one should pay the other) then the Commission can establish terms for them: reg. (7). If the cable service chooses not to carry the signal, then it must give notice to the public and its customers, and file a revised tariff with the Commission. In the latter case, where the cable service chooses not to carry the signal, there is no provision in regulation 12 which permits either the Commission or the Minister to order it to do otherwise. In particular, where a cable service has chosen not to carry a broadcast station's programming, sub-regulation (7) cannot be used to compel it to do so. That is because that sub-regulation

says in express terms that it only applies where "a licensee[7] chooses to carry the television programmes on a 'retransmission consent' basis".

THE FACTUAL BACKGROUND

15. It may be that there is a history of disagreement between the parties, particularly over the question of payment, and, no doubt, each considers the other to be in the wrong, but that can have no bearing on the legal interpretation of regulation 12, and its interrelation with sections 21 and 23 of the Act.

16. For the purpose of the application of regulation 12, the factual background is not really in dispute. By letter of 29th October 2008, ZBM's attorneys wrote to Cablevision electing the 'retransmission consent' basis:

> "Pursuant to regulation 12 of the Cable Television Service Regulations 1987 as amended by the Cable Television Service Amendment Regulations 2008, our client hereby provides you with formal notice of its election for its television programs on CBS, ABC and the BBC to be carried on a "retransmission consent" basis, from the commencement of the first election period, being 1 November 2008.
>
> In accordance with Regulation 12, as amended, within 30 days of the date of this letter, we expect to receive your written confirmation as to whether or not you intend to carry the television programs on the above mentioned channels."

17. The reference to CBS, ABC and the BBC in that letter are to programming on those American and British channels which are rebroadcast by ZBM, and make up much of their programme content, although I understand that they also carry original programming including the evening news. It may be, therefore, that the letter was not very well expressed, and indeed Cablevision's attorneys wrote back on 4th November, pointing out that such an election must cover all its programming and stating that they assumed the letter intended to do that. Cablevision's letter of 4th November then went on to say that Cablevision were considering the matter, and that in the meantime they had concerns about ZBM's copyright permissions for their re-broadcast material.

[7] 'licensee' in this context means a person licensed to construct, establish, maintain and operate" a cable television system: see the definition in reg. 2 of the Regulations.

18. On 7th November, ZBM's attorneys wrote back saying –

> "We confirm that our client has elected retransmission consent in relation to its programming currently carried on ZFB and ZBM."

The letter then went on to give assurances on the copyright issues. On 14th November Cablevision's attorneys replied querying those assurances, but that issue is not before me.

19. More to the point, on 20th November Cablevision's attorneys wrote asking what fee ZBM was seeking for its programming, and referred to an earlier demand for $2.50 per month per subscriber. There was no immediate response to that, but on 28th November Cablevision's attorneys wrote again:

> "While Cablevision has always been happy to carry channels 7 and 9 over its cable network, and to do so free of charge, it does not believe that Cablevision and its customers should pay for channels available for free on antennae. Cablevision accordingly, and pursuant to Regulation 12(6) of the Cable Television Service Regulations 1987, chooses not to carry your client's programming on a retransmission consent basis. Cablevision remains willing to carry these channels on the old basis."

The letter then went on to say that Cablevision would be giving notice of this to its customers in accordance with the regulations, and that it would cease to carry ZBM's channels at midnight on Thursday 11th December, unless ZBM wanted them to discontinue them earlier. Cablevision then gave that notice to its customers, both by letter and by advertisement in the local newspaper. This also gave rise to some news coverage in the local media.

20. That media coverage elicited the response from the Acting Director of Telecommunications which is the subject of this application. As noted above, he wrote on 2nd December asserting that Cablevision required the permission of the Commission to discontinue its retransmission of ZBM's programmes. That letter concluded –

> "As a result, BCV *(i.e. Bermuda Cablevision)* must not remove channels 7 and 9 as advertised in your articles."

Cablevision's attorneys responded the next day, saying that it would be unlawful for it to continue to retransmit the programming and setting out at length its position on the meaning and effect of regulation 12, and its relationship with the rest of the legislation. They concluded by saying that if the Acting Director did not agree with their position it was the intention of Cablevision to have the matter resolved by the Supreme Court.

21. On 5th December the Commission wrote to both parties declaring –

> ". . . this is a matter of urgency that therefore justifies an ex parte decision to stop this matter proceedings any further until the Commission can hold an inter partes enquiry for the purpose of making a decision.
>
> "Bermuda Cablevision Ltd. And Bermuda Broadcasting Co. Ltd. are to restrain (sic) from proceeding to any other body until the Commission, the appropriate body to hear complaints and hold enquiries under the Telecommunications Act 1986 (as amended) can conclude its enquiries."

22. By a letter of the same date, the Acting Director declined comment on the legal position in view of the Commission's stated intention to conduct an inquiry, and said:

> "Lastly, we have reviewed our letter of December 2, 2008. For clarification, this letter was not a directive to Bermuda CableVision Ltd."

23. Finally, on the same date, ZBM wrote a long letter to the Commission, making a formal complaint about Cablevision's conduct in respect of the run-up to this matter and dating back to a press release by Cablevision shortly after the making of the 2008 regulations. They state –

> "BBC is asking for an audience with the Telecommunications Commission in order to clarify the Amendment Regulations and where BBC stands. At this stage, we need clarification as to whether we are under Regulation 12(6) or 12(7) because of Cablevision's uncooperative nature. We believe that we are operating under 12(7)."

And they consent to Cablevision continuing to carry their stations pending the Commission's inquiry and determination. It is important to note that ZBM were not taking the same point as the acting Director. They are not saying in their complaint that Cablevision needs the Commission's consent. They are saying that, as a matter of fact, Cablevision had responded to their election by choosing 'retransmission consent', and they wanted the Commission to rule on that issue.

THE ISSUES

24. As noted above, the two issues raised on this application are:

> (i) whether the Specified Carrier provisions require Cablevision to obtain the consent of the Commission to cease to carry ZBM, notwithstanding that it has exercised its option not to do so under the new regime; and
> (ii) whether section 21(1)(i) of the Act applies to like effect.

25. Various matters are not raised by this application, and I think it important to identify them before going to consider the issues which are raised. This application does not raise the question of section 21(8)[8] as that was not relied upon by the acting Director in his letter of 2nd December 2008. Nor, in my view, does this application raise the question of the requirements of Cablevision's licence. Cablevision holds a Cable Television Service Licence under section 13 of the Act. Such licences are granted by the Minister, and not by the Commission. The current licence was granted on 20th September 2002 (although there were preceding licences), and continues until 20th September 2013. It is a condition of that licence that:

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[8] Section 21(8) provides –

> "(8) No Carrier may disconnect another Carrier without the consent in writing of that Carrier or the Minister."

There are then provisions in subsections (9) to (12) governing the grounds for disconnection and the procedure for obtaining the Minister's consent, which includes a referral to the Commission.

> "6. The licensee shall carry in the basic service tier, all television programmes broadcast by a broadcasting television station licensed in Bermuda."

26. It may be that the requirement to continue carrying the broadcast channels will remain until the licence is varied. That can be done by the Minister either of his own motion or on the application of Cablevision[9], or, as an alternative route, Cablevision can apply to the Commission to consider the matter and make recommendations to the Minister[10]. However, the form of the current application does not raise the question of ministerial consent, and I express no view on the need for that.

27. As to ZBM's position that Cablevision has chosen to carry its programming on a retransmission consent basis, and that the only remaining issue is the price, that point is not properly before me either. It is not raised by the terms of the declaration sought. Moreover, counsel for ZBM says that there is other material not before the Court which has a bearing on this issue, and that I should not therefore embark upon a consideration of it. The Commission, on the other hand, asks for guidance on this. However, I do not think that I can properly give any guidance at this point. The matter is not raised by the form of the current application, and it may be, therefore, that it is not fully addressed in the evidence. If ZBM maintains this assertion, the Commission will have to look at all the evidence and see what it makes of it. I express no view on it.

28. Turning then to the first of the two issues that are before me, the Department and the Commission rely upon the fact that Cablevision is a Specified Carrier. A 'Specified Carrier' is simply one which is specified in the First Schedule to the Act, and there is no dispute but that Cablevision is so specified. The provisions relating to such carriers appear designed to deal with competition issues,[11] and the evidence is that Cablevision continues to be specified due to its "current market dominance": see the Minister's letter

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[9] See section 13(1)(b) of the Act.
[10] See section 13(2) of the Act.
[11] Section 14(2) of the Act allows the Minister to specify a carrier where he "is of the opinion that—
> (a) a Carrier or a group of Carriers is in substantial control of a public telecommunication service so that there is insufficient competition to stimulate reductions in rates and charges and to provide adequate freedom of choice to the public;"

of 11 July 2005 refusing Cablevision's request to remove it from the list of specified carriers.

29. Specified carriers may not impose or vary their charges without first submitting them to the Commission: see section 14(1) and section 23(1) of the Act. Nor may a specified carrier introduce a new service without giving notice and obtaining the Commission's approval: see sections 23(1) and 24(1). In particular the Commission has the power to "disallow" a new service. It is the contention of the Department and the Commission that by dropping channels 7 and 9 Cablevision would, in some way, be instituting a new service within the meaning of these provisions.

30. The Department and the Commission also rely upon Section 21(1)(i) of the Act, which provides –

> "(1) Subject to this section, it shall be the duty of every Carrier –
> . . .
> (i) to maintain existing services unless permitted by the Commission to discontinue such services;"

Based on that, the Department and the Commission take the position that Cablevision requires the Commission's permission to drop channels 7 and 9, notwithstanding compliance with the provisions of regulation 12.

31. Against that, it is Cablevision's contention that regulation 12 contains a complete and self-contained code for the retransmission of local broadcast stations. It argues that the provisions of the regulation are to be viewed as statutory in nature, and as part of the statutory framework of the Act. Thus, as section 23 is prefaced by the words "subject to this Act," its provisions are to be read as subject to regulation 12. They also argue that where regulation 12 has been complied with, that amounts to implicit permission from the Commission and/or the Minister to discontinue the programmes concerned.

32. Cablevision prays in aid section 99 of the Copyright and Designs Act 2004, which provides:

> **"Reception and re-transmission of broadcast in cable programme service**
> 99. (1) This section applies where a broadcast made from a place in Bermuda is, by reception and immediate re-transmission, included in a cable programme service.
> (2) The copyright in the broadcast and in any work included in the broadcast is not infringed if the inclusion is in pursuance of a relevant requirement.
> (3) In this section "relevant requirement" means a requirement under regulations made pursuant to section 59 of the Telecommunications Act 1986 regulating the provision of cable television service in Bermuda."

33. That provision is important because it means that Cablevision is protected against any action for breach of copyright not only by ZBM[12] but also by the owners of the copyright in the American and other programming that they themselves re-broadcast. Mr. Hargun argues that that protection only exists where Cablevision's retransmission is pursuant to a requirement contained in regulations, which for these purposes can only mean regulation 12. If they are not required to retransmit under those provisions, he argues that they are not protected. In particular they are not protected if they are required to do so by the operation of the Act itself, or by a direction of the Commission or Minister made thereunder.

34. Cablevision also say that, in any event, the provision of a channel is not a service within the meaning of the Act, and so the discontinuance of a channel, or the programming carried on it, does not engage the provisions of either section 21(1)(i) or section 23. In support of this they rely, inter alia, upon the definition of 'Cable Television Service' in section 2 of the Act.

35. The nominal respondent, the Department, takes the position that the regulations cannot override the express provisions of the Act, and to the extent that they may purport

[12] While the proposition that ZBM itself would sue for breach of copyright when it was insisting that Cablevision carry their programming might seem fanciful, that is exactly what it threatened to do by letter of 17th June 2008.

to do so, they are *ultra vires* and void. They therefore maintain that the permission of the Commission is required to discontinue a service or to introduce any new service, and it is their case that, by dropping two channels from their basic tier, Cablevision are in fact and law introducing a new service. Mr. Douglas also argues that the Regulations cannot fetter the Commission's statutory discretion when it considers whether or not to permit the new service. The Commission takes a similar position, but in the event that I was against them asks for guidance on various issues, including the position taken by ZBM. ZBM, while supporting the argument that Cablevision needs the permission of the Commission to cease carrying their programming, take a different tack, arguing that Cablevision has responded to their election by impliedly choosing to carry ZBM's programming on a retransmission consent basis, and that the only point for the Commission to decide is the appropriate fee that Cablevision should pay for doing so. As noted above, I do not think that that issues is properly before me.

CONCLUSIONS

(i) Specified Carrier Point

36. As noted above, there is no dispute but that Cablevision is a specified carrier and has, therefore, to comply with sections 14 and 23. Those provisions are largely concerned with pricing, the intent no doubt being to restrict a service provider with market dominance from exploiting its position. However, section 23 also requires a Specified Carrier to obtain the Commission's approval before introducing "a new telecommunication service". The question is, what is meant by that expression. Historically the Commission, and apparently also Cablevision,[13] have treated it as extending to the addition or subtraction of individual channels, but that is not determinative of the question.

37. "Telecommunication service" is defined in section 2 of the Act as:

> ". . . a service consisting in the conveyance of anything by means of telecommunication whether or not the circuits are provided by the service provider or others;"

[13] See the second affidavit of Ronald Simmons JP, the Chairman of the Commission.

There is no separate definition of "service" in the Act. Telecommunication is defined as:

> ". . . any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio, optical, or other electromagnetic system and cognate expressions shall be construed accordingly;"

38. In considering all of this it is perhaps helpful to bear in mind that the Act and the Commission deal with all kinds of telecommunication, including the provision of telephone and data services, so that television is but one subset of their remit. In that regard the Act contains a definition of "cable television service" as –

> "a service under common ownership and control providing programmes to persons for their instruction, information and amusement by means of visual images and sounds conveyed by wire communication from a common centre . . ."

It is implicit in that that the programmes are something distinct from the service itself.

39. The Regulations contain other relevant definitions. A 'cable television system' or 'System' is defined as:

> ". . . a non-broadcast facility consisting of a set of wire transmission paths and associated signal generation, reception and control equipment, under common ownership and control, designed and intended for cablecasting:"

And a 'channel' is defined as:

> ". . . a discrete circuit in a System linking the licensee with a subscriber for the purpose of passing intelligence;".

40. On the face of these definitions the 'service' is the general provision of cable television, not the individual programmes, nor the channels. This is strongly reinforced by the general scheme of the Regulations, which are (with the notable exception of regulation 12) concerned with the overall system by which a "cablecasting service" is disseminated. Thus regulation 32 provides –

> **"Provision of cable television service**
> 32. Cablecasting service, as provided by a licensee through the System, shall be made available to all individual dwellings, residences, including apartments, condominiums, institutions, organizations, businesses and all other entities including any other System, within the area in which it is authorized by its licence to install and operate a System."

41. Against that background, I do not consider that programming is the direct concern of the Commission, and is not the subject of control by it under section 23. Once that is understood it also clarifies the relationship between regulation 12 and the Act, and removes any apparent conflict. All this, of course, is quite distinct from the question of the price, and the Commission retains its jurisdiction over that. If it considers that the price of Cablevision's basic tier should be reviewed in light of the loss of ZBM's programming, it can undertake that review of its own motion at any time under section 24(5) of the Act[14], which refers in terms to the pricing of 'part' of a service.

(ii) Section 21 Point

42. The same reasoning also applies to section 21(1)(i). It has to be conceded that in this case the issue is not quite so clear, as that subsection refers to "existing services" rather than "existing *telecommunication* services", but I do not think that it would make sense to give the word "service" different meanings in different parts of the Act.

43. Were I wrong on the above, and were it the case that "service" extended to the programming on individual channels, then I would have held that the provisions of the Act would have to be complied with, as they are contained in primary legislation, which cannot be abrogated or modified by regulations, and to that extent I would have accepted Mr. Douglas's submissions on this aspect. I would have held, therefore, that the operation of regulation 12 does not absolve Cablevision from obtaining any necessary consents. It may be that obtaining those consents is a mere formality. Where regulation 12 has been

[14] Section 24(5) provides:
"(5) On receipt of a complaint regarding a Carrier's rates and charges, on the direction of the Minister, or of its own motion, the Commission may review the Carrier's rates and charges after making such enquiry into the matter as the Commission may think fit and having regard to subsection (2), where applicable, and may give a direction changing the rates and charges for the service in whole or in part."

complied with, it is hard to envisage any grounds on which the Commission could properly refuse its permission or consent, but until they had considered the matter I would not have known how they would proceed and so could have given no considered decision upon it.

44. I should also add that I consider the Department's argument that the Regulations cannot fetter the Commission's statutory discretion is misconceived. The Regulations, and in particular regulation 12, are not just some informal policy that has been dreamed up outside of the statutory framework. As Mr. Hargun rightly points out, the regulations themselves have the force of statute. They have been promulgated by the Minister under an express statutory power, after consultation with the Commission[15] and with the tacit consent of Parliament.[16] They are not to be disregarded.

SUMMARY

45. In summary, therefore, the decision before me is simply one as to the interpretation of regulation 12 and the meaning of sections 21 and 23 of the Act. I am not concerned on this application with the broader rights and wrongs of the situation, nor with the broader public interest. The law simply says what it says.

46. Regulation 12 allows Cablevision to choose not to carry ZBM in certain circumstances. If Cablevision has properly and effectively exercised its choice under regulation 12 not to carry ZBM, then no further permission is required from the Commission under section 21(1)(i) or under sections 23 and 24 of the Act, and the Commission has no power under 24(1)(d) to forbid or 'disallow' this course. This is because individual channels do not each amount to a separate telecommunication service,

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[15] Section 59 of the Act provides that "The Minister may, after consultation with the Commission, make regulations for the proper carrying out of the provisions and purposes of this Act . . . and in particular, but without prejudice to the generality of the foregoing, may by regulation provide inter alia for –

(x) generally regulating the conditions under which cable television service and subscription radio service may be established, maintained and operated:"

[16] Section 59(5) of the Act provides that the negative resolution procedure applies to regulations made under that section. That procedure requires the regulations to be laid before both Houses of the Legislature, and if within a specified period either House resolves that the regulations should be annulled, they are: see section 8 of the Statutory Instruments Act 1977.

so that channels can be abandoned without it amounting to a failure to maintain an existing service or constituting what remains as a new service.

47. I cannot, and do not purport to decide on this application whether or not Cablevision has effectively exercised its choice not to carry ZBM. Nor do I decide whether its licence still requires it to carry ZBM. Neither of those issues properly arises given the way the case has come before the Court.

47. I will hear the parties on the exact form of any declaration I should give, and on costs.

Dated this 9th day of January 2008

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Richard Ground
Chief Justice