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(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA
(GENERAL DIVISION)

BETWEEN:

File No. CI08-01-58411:	)	APPEARANCES:
BELL EXPRESSVU INC.,)	
	)	<u>Mark Newman</u>
applicant,	)	for Bell Expressvu Inc.
- and -)	
)	
CITY OF WINNIPEG and ASSESSOR FOR	)	<u>Michael A. Jack</u>
THE CITY OF WINNIPEG,	)	for the City of Winnipeg
respondents.)	
File No. CI08-01-58849:	)	<u>Michael A. Conner</u>
BELL EXPRESSVU INC.,	)	for Attorney General of
	)	Manitoba
applicant,)	
- and -)	
	)	<u>Antoine F. Hacault</u>
THE CITY OF WINNIPEG,	)	for Star Choice
respondent,)	
File No. CI09-01-60709:)	
STAR CHOICE TELEVISION NETWORK)	
INCORPORATED,	)	JUDGMENT DELIVERED:
applicant,	)	February 8, 2010
- and -)	
)	
THE CITY OF WINNIPEG, THE TAX)	
COLLECTOR FOR THE CITY OF WINNIPEG,)	
and THE ASSESSOR FOR THE CITY OF)	
WINNIPEG,)	
respondents.)	

GREENBERG J.

[1] The applicants, Bell ExpressVu Inc. ("Bell") and Star Choice Television Network Incorporated ("Star Choice"), provide direct-to-home satellite television service to customers in the City of Winnipeg. In these applications, they challenge the authority of the City to impose business tax on them.

[2] It is common ground that the City's authority to impose tax on the applicants must be found in s. 32 of *The Municipal Assessment Act*, C.C.S.M. c. M226 (the "*MAA*") which allows municipalities to impose business tax on persons who provide television reception service. That provision was first enacted in 1971 to allow municipalities to tax cable television service providers. The nub of the applicants' argument is that satellite television service was not contemplated by the legislature when the section was enacted nor is the wording of s. 32 broad enough to apply to it.

[3] For the reasons that follow, I agree with the applicants that the current legislation does not authorize the imposition of business tax on them.

BACKGROUND

[4] The factual background to this dispute is not contentious. The applicants have been providing satellite television service to consumers in the City of Winnipeg since the mid 1990's. However, it was not until 2007 that the City, relying on s. 32 of the *MAA*, advised Bell and Star Choice that it would begin to impose business tax on both companies.

[5] Bell and Star Choice take the position that, while s. 32 authorizes the imposition of business tax on companies that provide cable television service in

Winnipeg, it does not authorize taxation of satellite service providers. While the applicants paid the business tax for the years 2007 and 2008, they did so under protest on the understanding that they would be challenging the application of s. 32 to their enterprises and that they expected the tax paid to be refunded if their challenges were successful.

[6] In accordance with the appeal process under Part 8 of the *MAA*, Bell and Star Choice applied to the Board of Revision for a determination of their liability to pay business tax. The Board found that the companies were liable to pay tax under s. 32. The companies now appeal the Board's order to this court.

[7] In order to understand the legal arguments in this case, it is necessary to understand the technology involved in the delivery of television service and the difference between cable and satellite service.

The Technology

[8] When television service first became available in Canada, television signals were transmitted directly from broadcast studios to consumers who would pick up the signal through roof antennas or "rabbit ears". In the late 1960's, cable television service became available. With cable service, the cable company receives television signals from broadcast studios at facilities called "head-ends". The signals are then redistributed to consumers through a "terrestrial" network of cables, which run either underground or above ground on telephone or hydro poles, from the head-end to the customer's home and inside the home to the television set. Amplifiers installed at intervals throughout the cable network are

used to boost the signal. So with a cable system, the service provider has a physical presence in the location where the service is provided as a result of the equipment used to distribute the signal as well as the need for a presence to maintain that equipment.

[9] Satellite television service allows for the distribution of television signals without a terrestrial network. The service provider receives television signals from broadcast studios at an “uplink” facility. The uplink facility sends the signals to a satellite orbiting over Earth and the signal is retransmitted to consumers who have the equipment necessary to receive it. Bell’s uplink facility is located in North York, Ontario. Star Choice has uplink facilities in Toronto, Mississauga, Calgary and Vancouver. Neither company has a facility in Manitoba.

[10] The equipment which the consumer needs to receive the satellite signal includes a satellite dish that is mounted on the exterior of the consumer’s home and a satellite receiver or set-top box which decodes the signal. The only cables or wires involved are the cable that runs from the satellite dish to the set-top box and the short cable that runs from the box to the television.

[11] Neither Bell nor Star Choice occupy any premises in the City of Winnipeg nor do they own any property in the City. Neither company has offices in Winnipeg; the facilities from which they distribute television signals are located in other provinces; and there is no terrestrial infrastructure in Winnipeg that is used to distribute the signals. While the equipment which the consumer needs in order to receive the satellite signal is produced by Bell and Star Choice, it must

be purchased by consumers through retailers in the same way that they would buy their television sets.¹

How the tax is calculated

[12] The tax imposed by the City under s. 32 of the *MAA* is calculated as a percentage of the gross revenue of the business in the year preceding the tax year. To that end, s. 32(4) requires the company to file a return each year showing its revenue for the preceding year for “service provided in the municipality” (s. 32(2)).

[13] The evidence disclosed that, because satellite receivers are portable, a customer with a Winnipeg billing address may in fact be receiving satellite service outside the City. For example, a Winnipeg customer may take the receiver to a cottage on weekends or may use the equipment in a motor home and receive television signals while travelling anywhere in North America. This suggests that a tax based on customers with Winnipeg billing addresses could have “extra-territorial” effect. However, at the hearing counsel for the applicants acknowledged that the applicants have the technology to determine whether signals are being received in Winnipeg so that their annual returns would disclose only revenue from that source.

¹ For a short period of time, customers could rent equipment from Star Choice. Since 2002, customers have been required to purchase the equipment. However, Star Choice grandfathered those customers who were renting equipment at the time and, as a result, it continues to have about 350 customers who rent satellite dishes from them. Counsel for the City conceded that the fact that Star Choice continues to own the equipment used by the few customers who continue to rent it is of no significance to the issues before me.

JURISDICTIONAL ISSUE

[14] While the City takes no issue with the jurisdiction of this court to decide Bell's appeal, it challenges the court's jurisdiction to hear Star Choice's appeal. The jurisdictional issue arose out of the following sequence of events. The City originally issued a demand for taxes to Star Choice Communications Inc. ("SCCI"), an affiliate of the applicant. SCCI appealed the assessment to the Board of Revision on the basis that s. 32 of the *MAA* does not apply to satellite television providers and on the basis that the City had assessed tax against the wrong entity as it is this applicant, Star Choice Television Network Incorporated, which is licensed by the CRTC to operate satellite service in Canada.

[15] On September 16, 2008, the Board issued its order dismissing the appeal. The order does not address the issue of whether the correct entity was taxed. The Board's brief reasons are as follows:

Section 32(1) of The Municipal Assessment Act provides for liability for assessment where there are no physical facilities apparent. The most reasonable conclusion is that there is liability for assessment by virtue of business being transacted within the geographical boundaries of the City of Winnipeg.

Since the applicant does provide a service within the municipality and by the language of said Section 32(1) it is deemed to carry on a business within the City of Winnipeg and is therefore liable for assessment: The quantum of the tax is as defined by the Municipal Assessment Act.

[16] SCCI appealed the Board's order to this court (File No. C108-01-58481). Before that appeal could be heard, the City acknowledged that it had taxed the wrong entity. It cancelled the demand for taxes against SCCI and issued a new tax notice for the years 2007 and 2008 to the applicant, Star Choice Television

Network Incorporated, who then filed the application that is now before the court seeking an order quashing the new tax notice and a declaration that it is not subject to business tax under s. 32 of the *MAA*.

[17] The City argues that this court has no jurisdiction to hear this application because Star Choice did not follow the process under the *MAA* for a review of its liability to pay tax which would require it to first appeal the new assessment to the Board of Revision and, only if unsuccessful at that stage, to bring a further appeal to this court. Star Choice responds that the Board of Revision has already ruled on the issue raised in its current application, that is to say, whether s. 32 of the *MAA* applies to it, and there would be no point in returning to the Board to make the same arguments it has already advanced.

[18] I agree that, from a practical perspective, it makes no sense to make Star Choice pursue another appeal before the Board, when the Board, albeit in very brief reasons, has already expressed its opinion on the issue. Moreover, the Board gave exactly the same reasons for dismissing the appeal filed by Bell, and Bell's appeal from that order is now before me.

[19] As a result, even if I have no jurisdiction to hear Star Choice's appeal, in deciding the Bell appeal, I will be deciding the very issue that Star Choice raises. Counsel for the City conceded that my decision on the Bell appeal will apply to both Bell and Star Choice. Moreover, he conceded that Star Choice should be entitled to make submissions on that issue in the context of the Bell appeal.

Therefore, I need not make a decision on the jurisdictional argument in order to address the substantive issue before the court.

THE SUBSTANTIVE ISSUE

[20] The issue before me on this application is whether the *MAA* authorizes the City to impose business tax on satellite television service providers. That issue turns on the proper interpretation of the statutory provisions.

[21] Unfortunately, the liability for business taxes in the City of Winnipeg and the basis for the assessment of those taxes is rather awkwardly split between two statutes - *The City of Winnipeg Charter*, S.M. 2002, c. 39 (the "*Charter*") and the *MAA*.² Section 332(2) of the *Charter* suggests that, unless specifically exempted, all persons who operate a business in the City must pay either business tax or a licence fee. As there is no licence fee applicable to the applicants, the wording of s. 332(2) would suggest that they must pay business tax. However, the definition of "business tax" in the *Charter* only allows for its assessment in one of two ways: 1) under Part 8 of the *Charter*, or 2) under s. 32 of the *MAA*. It is common ground that Part 8 does not apply to the applicants because its provisions provide for the assessment of tax on businesses that occupy premises in the City and the applicants do not occupy premises in the City. Therefore, the only basis for assessing business tax against the applicants is under s. 32 of the *MAA*.³ The City concedes that, if s. 32 does not apply to the

² The relevant provisions of those statutes are attached as appendices.

³ In fact, the correspondence from both the City Assessor and counsel for the City to the applicants, in which they indicate their intention to commence taxing the applicants, refers to s. 32 as the authority to do so.

applicants, it does not have legislative authority to assess business tax against them. Therefore, the issue for me to decide is the proper interpretation of s. 32, in particular, subsection (1) of that section.

[22] In its application, Bell also challenges the constitutionality of the current statutory provisions. It argues that even if s. 32(1) applies to it, the provision is beyond provincial legislative jurisdiction because it has the effect of imposing an indirect tax. As I have decided that s. 32(1) of the *MAA* does not apply to Bell, there is no need to rule on its constitutionality. The Supreme Court of Canada has repeatedly advised against deciding constitutional issues where there is no need to do so (see e.g. *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97).

ONUS OF PROOF

[23] The City, relying on s. 53(2) of the *MAA* suggests that the onus is on the applicants to show that s. 32 does not apply to them. However, s. 53(2) applies only to the procedure before the Board of Revision. An appeal of the Board's order to this court is treated as a new hearing (s. 56(4)) and the *MAA* is silent as to where the onus lies on the appeal. This is of note because the *MAA* does stipulate where the onus lies in cases where the order of the Board of Revision is appealable to the Municipal Board (ss. 59(5), 59(6)).

[24] Since the *MAA* is silent as to where the onus lies, one must look to the common law. Counsel for Star Choice referred to *Québec (Communauté*

urbaine) v. Corp. Notre-Dame de Bon-Secours, [1994] 3 S.C.R. 3, as holding that the burden of proof rests on the taxing authority in cases involving the interpretation of legislation that imposes a tax obligation and on the taxpayer in cases involving the interpretation of legislation creating a tax exemption. However, the comments of Gonthier J. in that case regarding the burden of proof were subsequently explained by Lebel J. in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20:

26 PDC and the majority of the Court of Appeal, cite *Notre-Dame de Bon-Secours* for the proposition that the party claiming the benefit of a legislative provision has the burden of showing that he or she is entitled to rely on it. Specifically, at p. 15, Gonthier J. held:

The burden of proof thus rests with the tax department in the case of a provision imposing a tax obligation and with the taxpayer in the case of a provision creating a tax exemption.

Gonthier J.'s statement in *Notre-Dame de Bon-Secours* was *obiter dicta*, made in the context of explaining the traditional rule that tax legislation must be strictly construed. His point was simply that the residual presumption in favour of the taxpayer, which follows from the strict construction rule, was distinct from the concept of burden of proof. The burden of proof was not at issue in the case before him, and Gonthier J.'s comment was made in passing, without reference to the leading case law establishing the burden of proof in tax cases. The fundamental rules on the allocation of evidentiary burden in this matter remain valid. I cannot accept that, with this statement, he intended to overrule an established body of jurisprudence. The taxpayer bears the burden of displacing the Minister's factual assumptions, but the concept of burden of proof is not applicable to the interpretation of a statute, which is necessarily a question of law: *Johnston*.

[emphasis added]

[25] As the factual foundation in this case is not contentious, in deciding the legal issues, my analysis will not be affected by the assignment of a burden of proof.

THE LAW ON STATUTORY INTERPRETATION

[26] It is now well settled that taxing statutes should be construed according to the principles that govern the interpretation of other statutes. As Lebel J. explained in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, *supra*:

21 In *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, this Court rejected the strict approach to the construction of taxation statutes and held that the modern approach applies to taxation statutes no less than it does to other statutes. That is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (p. 578): see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11. Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process.

22 On the other hand, where the words of a statute give rise to more than one reasonable interpretation, the ordinary meaning of words will play a lesser role, and greater recourse to the context and purpose of the Act may be necessary: *Canada Trustco*, at para. 10. Moreover, as McLachlin C.J. noted at para. 47, "[e]ven where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities". The Chief Justice went on to explain that in order to resolve explicit and latent ambiguities in taxation legislation, "the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation".

23 The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622. Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose

may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.

24 Although there is a residual presumption in favour of the taxpayer, it is residual only and applies in the exceptional case where application of the ordinary principles of interpretation does not resolve the issue: *Notre-Dame de Bon-Secours*, at p. 19. Any doubt about the meaning of a taxation statute must be reasonable, and no recourse to the presumption lies unless the usual rules of interpretation have been applied, to no avail, in an attempt to discern the meaning of the provision at issue. In my view, the residual presumption does not assist PDC in the present case because the ambiguity in the Mining Tax Act can be resolved through the application of the ordinary principles of statutory interpretation. I will say more on this below.

[emphasis added]

[27] As explained in the above quote, the starting point in interpreting a statutory provision is the ordinary meaning of the words used but, except where the words are precise, one must consider the meaning of the words using a purposive and contextual analysis.

[28] In *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, Iacobucci J. explained the purposive and contextual approach and also explained that the analytical framework need not be applied with rigidity:

34 The grammatical and ordinary sense of the words employed in s. 70(1)(b) is not determinative, however, as this Court has long rejected a literal approach to statutory interpretation. Instead, s. 70(1)(b) must be read in its entire context. This inquiry involves examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue.

And at par. 28:

28 While the interpretive factors enumerated by Driedger need not be applied in a formulaic fashion, they provide a useful framework through which to approach this appeal, given that the sole issue is one of statutory interpretation. However, I note that these interpretive factors

are closely related and interdependent. They therefore need not be canvassed separately in every case.

[29] As I will explain, it is not contentious that the purpose of s. 32(1) was to allow municipalities to impose business tax on cable service providers. The real issue is whether the words of the section should be restricted in their application to the type of television service providers that were known and contemplated when the legislation was enacted or whether the words are broad enough to include new technologies, in particular satellite television.

ANALYSIS

[30] As I have said, the issue before me is the interpretation of s. 32(1) of the *MAA* which reads:

Business tax on cable television service

32(1) Where a person, within a municipality, provides a television reception service by means of, in whole or in part, cables, wires and other equipment or facilities, the person, in providing the television reception service and related services, is deemed to be carrying on a business in the municipality and is liable in each year to payment of a business tax to the municipality equal to 1% of the gross revenue of the business in the year that precedes the year for which the tax is payable.

[emphasis added]

The section provides for taxing those who provide television reception service “within a municipality ... by means of, in whole or in part, cables, wires and other equipment or facilities.”

[31] The applicants’ position is that they do not provide television service in Winnipeg “by means of ... cable, wires and other equipment or facilities” and, therefore, s. 32(1) is not applicable to them. Neither Bell nor Star Choice has a facility in Winnipeg from which it transmits signals. Their uplink facilities are

located in other provinces. Unlike cable television providers, neither applicant owns a terrestrial network of cables in the City of Winnipeg. Nor do they own any other equipment in the City to facilitate the distribution of their signals.

[32] While the City acknowledges that the applicants do not own real or personal property in Winnipeg, it says that there is no need for a person to have a physical presence in Winnipeg for s. 32(1) to apply. The City argues that s. 32(1) applies as long as a person is providing television service within the municipality. However, while it is true that the person must be providing television service within the municipality in order for s. 32(1) to apply, the section does not authorize taxing a person simply because the service is provided in the municipality. It may be that the legislation could authorize the imposition of a business tax on that basis alone. But it does not do so. It adds a qualifying phrase that limits tax liability to persons who provide television service “by means of ... cables, wires and other equipment or facilities.” Some meaning must be given to that modifier.

[33] While, undoubtedly, the applicants have equipment and facilities elsewhere, in my view, the grammatical meaning of the words of the section allow for tax only where a person has equipment “within [the] municipality”.

[34] The City also argues that the applicants do provide television reception service by means of cable, wires or other equipment in the municipality because the consumer must have cable and other equipment (a satellite dish and set top box) to receive the signal. It argues that the television reception service is not

complete until the consumer receives it. The fact that the applicants do not own the equipment used by the consumer does not mean it is not providing a reception service “by means of” it.

[35] In my view, that interpretation of the section strains the meaning of the words. Looking at the words s. 32(1) in their grammatical sense and reading the subsection as a whole (“Where a person ... provides a television reception service by means of, in whole or in part, cables, wires and other equipment or facilities, the person, in providing the television reception service ... is deemed ...”) suggests that the modifying phrase refers to the use of cables, etc. by the service provider to deliver the service, not the use of cables, etc. by the consumer to receive it.

[36] I note that determining the ordinary meaning of the words in issue here would not be assisted by looking to dictionary definitions because the contentious issue relates to the grammatical sense of the section when read as a whole rather than the meaning of the individual words. I also recognize that determining the grammatical meaning of words is necessarily a subjective exercise. As stated by Professor Sullivan, **Sullivan on the Construction of Statutes**, (5th ed., 2008), at 25-6:

The expression “ordinary meaning” is much used in statutory interpretation, but not in a consistent way. Sometimes it is identified with a dictionary meaning, sometimes with a “literal meaning” and sometimes with a meaning derived from reading words in their literary context. Most often, however, ordinary meaning refers to the reader’s first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context – in the words of Gonthier J., “the natural meaning which appears when the provision is simply read through”.
[footnotes omitted]

[37] In my view the natural meaning of s. 32(1) when the section is simply read through is that it applies to those who have a terrestrial network of equipment in the municipality in order to deliver television service. On that reading of the section, it would not apply to the applicants. In any event, if I am wrong in my assessment of the ordinary meaning of s. 32(1), then, at the very least, a textual reading of the words of s. 32(1) leads to ambiguity as to its scope. Therefore, one must look to the purpose and context of the provision.

Purpose

[38] It is now accepted that the legislative history of a provision and, in particular, the comments of the responsible Minister in introducing the legislation, can shed light on the meaning to be attributed to it (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at par. 34-5; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, at par. 37).

[39] Section 32 was enacted in 1971 as part of a number of amendments introduced in Bill 103, *An Act to amend The Municipal Assessment Act*. It is obvious, and the City concedes as much, that the intention of the Government in introducing the amendment was to allow municipalities to tax cable television providers. The Minister of Municipal Affairs, Mr. Pawley, referred to “Cable TV” in introducing the amendment to the *MAA* (Legislative Assembly of Manitoba, Debates and Proceedings, July 16, 1971, at 2856):

The Committee also decided that Cable TV should be taxed – those that are conducting such business within a municipality should be assessed and should pay business tax in the same manner as do other commercial enterprises within municipalities.

[40] Satellite television was not in existence in 1971 so could not have been contemplated by the legislature. Of course, one might argue that Minister Pawley's comments shows that the decision to tax cable providers was based on the fact that they were conducting business in the municipality not on the terrestrial connection to it. However, an examination of case law that preceded the enactment of the amendment sheds more light on the legislative intent. As explained by Professor Sullivan, **Sullivan on the Construction of Statutes**, at 205:

The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is very far-reaching. It credits the legislature with the vast body of knowledge referred to as legislative facts and with mastery of existing law, both common law and statute law and the case law interpreting statutes.

[footnotes omitted]

[41] The legislative history may show that a provision was enacted for the specific purpose of overruling a judicial decision (see e.g. *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, at par. 37); *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187, at par. 15).

[42] Not long before Bill 103 was introduced, the Manitoba Court of Appeal released its decision in *Metro Videon Ltd. v. Fort Garry (Rural Mun)* (1969), 6 D.L.R. (3d) 270, [1969] M.J. No. 60 (C.A.)(QL) which dealt with the authority of municipalities, under the previous legislation, to tax cable television companies. Guy J.A. explained the background to the case:

1 These are appeals from a decision of Triteschler, C.J.Q.B., arising from the recent introduction in Manitoba of cable television. Both applicants are in the business of transmitting hertzian waves or signals of varying frequencies to subscribers' homes through a coaxial cable. The cable is fastened to transmission poles or laid in trenches of the Manitoba Telephone System (hereinafter called M.T.S.). Under the terms of written agreements between the applicants and M.T.S. the cable is declared to be the property of M.T.S.

[43] Since it could not tax MTS for the cable use, the Rural Municipality of Fort Garry purported to tax the cable companies on the basis of a provision of the *Municipal Act*, R.S.M. 1954, c. 173, which allowed it to tax "occupiers" of land. It argued that the cable transmission system was land and the cable companies were occupiers of it. The Court of Appeal held that the companies were not occupiers of land and therefore, not subject to tax under the provision. Guy J.A. said:

12 If operators of cable television are to be assessed as occupiers of land under circumstances like the present, clearer language imposing liability would be required than is found in the present enactment.

[44] Before the amendment was enacted, the municipality attempted, without success, to tax cable companies on the basis of their "occupation" of land. It is reasonable to assume that the introduction of s. 32 into the *MAA* was intended to provide the clearer language needed to authorize the taxation. That is to say, that the policy basis for the taxation continued to be connected to the occupation of land within the municipality.

Headings

[45] The heading of the original version of s. 32(1) and the current heading both indicate that the section is focused on taxation of cable service providers.

The heading to the amendment enacted by Bill 103 was "Taxation in cable T.V. service". The current heading is "Business tax on cable television service".

[46] The City argues that s. 14 of *The Interpretation Act*, C.C.S.M. c. 180, prevents the use of headings in interpreting the provision. Section 14 provides:

14 Tables of contents, headings, notes, and historical references that appear at the end of a provision are included in an Act or regulation for convenience of reference only and do not form part of it.

[47] In *Menzies v. Manitoba Public Insurance Corp.*, 2005 MBCA 97, the Manitoba Court of Appeal referred to the "controversy" over whether headings can be used as interpretative aids, but declined to decide the issue. However, appellate courts in other provinces with similar legislation have found that reference to headings is permissible (see e.g. *Re African Lion Safari & Game Farm Ltd. and Kerrio et al.* (1987), 59 O.R. (2d) 65 (C.A.). And as Professor Sullivan points out, "To any person reading legislation, headings appear to be as much a part of the enactment as any other component. There is no apparent reason why they should be assigned an inferior status." (*supra*, at 392-3)

[48] At the same time as arguing that s. 14 of *The Interpretation Act* prevents reliance on headings in interpreting legislation, counsel for the City acknowledges that the reference to cable television in the heading is not surprising because, at the time the provision was enacted, there was no other means of distributing television signals.⁴ Because it is obvious that the target of

⁴ There was, of course, a way to pick up signals that were broadcast by television networks by using antennas or rabbit ears. But, as counsel for the City pointed out in argument, the City has never sought to tax networks for distributing signals because they are not in the business of selling their signals to consumers. Consumers simply are able to access them.

the amendment was cable companies, the City says that the headings are of no significance. Nevertheless, the headings reflect the purpose of the provision, and the purpose assists in interpreting the words used in the body of the provision. That is to say, because the provision was focused on cable television, it is reasonable to read the reference to cables, wires and other equipment as a reference to the tools used by cable companies to transmit their signal and not to television service providers generally.

Context

[49] The context to be considered in interpreting a legislative provision includes the other provisions of the statute that are directly related to the provision in issue. It may also include the legislative scheme as a whole, which usually means the particular Act in which the provision is found but may also, as in this case, include other related statutes. As explained above, the authority of the City of Winnipeg to impose business tax is found in the combined provisions of its *Charter* and the *MAA*.

[50] The applicants argue that the taxing scheme created by these two statutes is one based on property ownership and, looked at in that context, s. 32 is consistent with the scheme only if the television service provider owns property in Winnipeg. They say that when one looks through the provisions of the *MAA*, the basis for municipal taxation, whether it is tax imposed on residents or tax imposed on businesses, is ownership or occupation of real or personal

property in the municipality. Taxing a business that has no property in the municipality would be inconsistent with the general scheme of the Act.

[51] The applicants argue that cable service providers are taxed because they have a terrestrial network of cables in the City. Since satellite service providers do not have property in Winnipeg, it would not be consistent with the broader scheme of the Act to include them in the scope of s. 32.

[52] The City responds to this argument by saying that taxation in the City of Winnipeg is not based on ownership of property alone. While property may form one basis for taxation, the City can also tax those who conduct business in Winnipeg even if they do not own property in the City. Section 332 of the *Charter* provides:

Liability for real property taxes

332(1) Each person in whose name real or personal property in the city is assessed is liable to pay to the city real or personal property taxes imposed under this Act in respect of the property, except where the person or the property is exempted under this or any other Act from payment of such taxes.

Liability for business tax or fee

332(2) Each person in whose name business is carried on in the city or in whose name business premises are assessed is liable to pay to the city business tax or a licence fee, except where the person or the premises are exempted under this or any other Act from payment of business tax or the licence fee.

[53] The City argues that, while in most cases, the means for assessing business tax is based on the property of the business in the municipality (see e.g. *Charter*, s. 316(2)), s. 32 of the *MAA* provides a unique means of assessing tax that is specifically contemplated in the definition of “business tax” in the *Charter*.

"business tax" means the business tax imposed under
 (a) Part 8 (Assessment, Taxation and Other Levies on Property) on the business assessment of premises, or
 (b) section 32 (business tax on cable television service) of The Municipal Assessment Act;

[54] Both the applicants' and the City's arguments have some merit. In the end, though, the broader legislative context is not of great assistance in resolving the ambiguity as to the scope of s. 32. That being said, the immediate legislative context within which s. 32(1) is found does provide support for the applicants' position. In particular, reading s. 32 in conjunction with the provision that immediately follows it can lead to no other conclusion than that the section applies to cable companies only. Section 33(1) provides:

Subsection 32(1) business tax replaces usual tax

33(1) Subject to subsection (2), a business tax under subsection 32(1) is in the place of and replaces a business tax that is otherwise payable to a municipality with respect to the cables, wires or other equipment or facilities that are used in providing a television reception service.

[55] This provision reinforces the argument of the applicants that the policy basis underlying the imposition of tax on the cable service providers is that they maintain a terrestrial network within the municipality by means of which they provide their service. The legislature is presumed to use language consistently throughout the same statute (*Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385, [1992] S.C.J. No. 13 (QL), at par. 26-8). The "cable, wires or other equipment or facilities" referred to in s. 33(1) must mean cable, etc. within the municipality because the legislature could not authorize a municipality to tax a person for property located elsewhere. Moreover, reading s. 33(1) as referring to cable, etc. within the municipality

reflects the historical background to these provisions which is that they were enacted to overcome the problem the municipality was having with taxing the cable companies as “occupiers” of land in the municipality within the meaning of the provision of *The Municipal Act* in effect at that time.

[56] Section 33(1) also refutes the suggestion of the City that the cables and other equipment referred to in s. 32(1) would include cable and other equipment owned by the customer (see par. 34, *supra*). The reference to “cable, wires or other equipment or facilities” in s. 33(1) can only mean cables, wires or other equipment owned by the company not by the consumer since the consumer would not be liable to business tax to the City on television equipment that he or she owns.

[57] The argument that s. 32(1) is meant to apply to television service providers with a terrestrial network of cables in the municipality is also supported by the fact that s. 31(4) provides an exemption for the cable equipment from the usual personal property assessment:

Personal property tax exemptions

31(4) Personal property is exempt from taxation by a municipality where the property

...

(l) is a telecommunications system intended for or used in a cable distribution undertaking or a telecommunications carrier, including cables, poles, amplifiers, antennae and drop lines, installations, materials, devices, fittings, apparatus, appliances, machinery and equipment.

That is to say, but for the exemption, the cables and other equipment used by the television service provider would be subject to personal property tax. It is not subject to tax because an alternate method of assessing business tax is

provided for by s. 32(1), namely, a percentage of the business's annual gross revenue.

[58] The applicants' argument that the basis for taxing television service providers is the terrestrial network of cables is also consistent with the fact that the terrestrial network of telephone wires is the policy basis for the business tax paid by companies providing telephone service. Section 323 of the *Charter* provides:

UTILITY CORPORATIONS' PROPERTY

Utility corporations' property assessments

323(1) For the purpose of assessment and taxation, the property of a corporation providing telephone services fixed or placed in a street is deemed to be real property. The city assessor must not value that property but rather must assess it by entering in each year's real property assessment roll the amount of \$1,200,000. for each corporation that provides telephone services.

Liability of corporation for other tax

323(2) A corporation that has property assessed under subsection (1) is not exempt from real property tax on other real property owned by the corporation on the ground that it is liable for tax on that assessment.

Telephone companies

324 A corporation providing telephone service that pays real property tax for property fixed or placed in a street, and deemed by section 323 to be real property, is not subject to business tax for premises, or a part of them, used or occupied by the corporation for housing its telephone exchange and switching equipment.

[59] In my view, the historical and legislative context of s. 32(1) leads to the conclusion that the section was drafted to provide authority to tax enterprises that provide cable television service by means of cables and other equipment in the municipality. Since there was no other method for delivering television

service at that time, it is not surprising that the provision was not intended to apply to businesses providing television service by means of other technology.

Original Meaning

[60] The City argues that, while satellite television was unknown at the time that s. 32 was enacted, it is consistent with the intent of the legislature to read the section to apply to evolving technologies. Counsel for the City referred to two provisions of ***The Interpretation Act*** to support a “dynamic” approach to interpreting s. 32:

Law is “always speaking”

5 When a provision of an Act or regulation is expressed in the present tense, it applies to the circumstances as they arise.

Rule of liberal interpretation

6 Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

[61] The City argues that interpreting s. 32(1) of the *MAA* to apply to new technologies is consistent with the “fair, large and liberal interpretation” of the provision that is mandated by s. 6 of ***The Interpretation Act***. But s. 6 directs an interpretation that ensures the objectives of the law are attained. As I have already employed a purposive approach in interpreting s. 32(1), s. 6 adds little to the discussion.

[62] As for s. 5, while the section may indicate that statutes should be interpreted as evolving, an examination of the case law shows that whether the courts apply a static or dynamic approach to interpretation depends on whether the language of the Act has some flexibility. For example, where the language of

the statutory provision is drafted in general terms or confers a broad discretion, it is more likely that the court will apply a dynamic interpretation. In *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, [1994] S.C.J. No. 65 (QL), the Court applied a dynamic approach to interpreting the phrase “adequate, just and equitable” in British Columbia’s dependants’ relief legislation. McLachlin J. (as she then was) said:

15 ... The language of the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking (Interpretation Act, R.S.B.C. 1979, c. 206, s. 7), means that the Act must be read in light of modern values and expectations. What was thought to be adequate, just and equitable in the 1920s may be quite different from what is considered adequate, just and equitable in the 1990s. This narrows the inquiry. Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice.

[emphasis added]

[63] However, in cases where the legislature has chosen specific wording, courts have been less inclined to find that the wording can be adapted to new circumstances. In *R. v. Perka*, [1984] 2 S.C.R. 232, Dickson J. (as he then was) explained, at p. 264:

It is well established that technical and scientific terms which appear in statutes should be given their technical or scientific meaning: see *Maxwell on the Interpretation of Statutes* (12th ed. 1969) at p. 28. The question presented in the case at bar, however, is not whether the term "*Cannabis sativa L.*" should be assigned its scientific or technical meaning. The parties agree that it should. The real dispute, as I see it, is as to when, in temporal terms, that meaning should be fixed. ...

The doctrine of *contemporanea expositio* is well established in our law. "The words of a statute must be construed as they would have been the day after the statute was passed ..." *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239, at p. 242 (per Lord Esher, M.R.). See also Driedger,

Construction of Statutes (2nd ed. 1983) at p. 163: "Since a statute must be considered in the light of all circumstances existing at the time of its enactment it follows logically that words must be given the meanings they had at the time of enactment, and the courts have so held"; Maxwell on the Interpretation of Statutes, *supra*, at p. 85: "The words of an Act will generally be understood in the sense which they bore when it was passed".

This does not mean, of course, that all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted. In *Gambart v. Ball* (1863), 32 L.J.C.P. 166, for example, it was held that the *Engraving Copyright Act of 1735*, which prohibited unauthorized engraving or "in any other manner" copying prints and engravings, applied to photographic reproduction--a process invented more than one hundred years after the Act was passed. (See also Maxwell, *supra*, at pp. 102 and 243-44.) This kind of interpretive approach is most likely to be taken, however, with legislative language that is broad or "open-textured". It is appropriate, as the judgments of Viscount Sankey in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, and Viscount Jowitt in *Attorney-General for Ontario v. Attorney-General for Canada* (the Privy Council Appeals Reference), [1947] A.C. 127, indicate, to the interpretation of the words in constitutional documents, whose meaning must be capable of growth and development to meet changing circumstances. But where, as here, the legislature has deliberately chosen a specific scientific or technical term to represent an equally specific and particular class of things, it would do violence to Parliament's intent to give a new meaning to that term whenever the taxonomic consensus among members of the relevant scientific fraternity shifted.

[emphasis added]

[64] Courts will interpret legislation to adapt to new technologies where that is consistent with the intent of the legislature but judges must be careful about overstepping the proper role of the courts. If a statute is deficient, it is for the legislature to correct that deficiency. In the case at bar, it is clear that the only type of television service contemplated by the legislature when the legislation was enacted was cable television service and the wording chosen by the legislature is very specific to that type of technology. Reading s. 32(1) to apply to satellite television service would be straining the words of the provision and

effectively making a policy decision as to whether satellite television providers should be subject to tax, a decision which should be made by the legislature.

[65] I note that when s. 32 was enacted, the decision to tax cable service providers was not without controversy. Mr. McKenzie, the Member of the Legislative Assembly for Roblin spoke to the issue (Legislative Assembly of Manitoba, Debates and Proceedings, July 16, 1971, at 2857):

I'm only going to speak briefly on the bill. I quarrel with the taxation regarding cable television service. I live in a jurisdiction that our only television services as of today are from the Province of Saskatchewan; the only television that we can look at in Roblin constituency, or where my honourable colleague from Swan River comes from, is out of another province, and here the Honourable Minister is already taxing people. I'd love to have a cable television come into my area and give us a choice of another television station. ...

... but I do quarrel with this type of legislation coming in at this time and those of us that live in those jurisdictions haven't yet received CBC news based right out of this city of Winnipeg ...

Administrative Practice

[66] It is also of note in this case that, although the applicants began conducting business in Manitoba in the mid 1990's, it was not until 2007 that the City decided to assess them for business tax. In *R. v. Nowegijick*, [1983] 1 S.C.R. 29, Dickson J.(as he then was) said, at p. 37:

Administrative policy and interpretation are not determinative but are entitled to weight and can be an "important factor" in case of doubt about the meaning of legislation: per de Grandpré J., *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 S.C.R. 851 at p. 859.

[67] In *Nowegijick*, the Court considered a Revenue Canada interpretation Bulletin and interpreted the exemption from taxation for Indians under the *Indian Act* in a manner consistent with it.

[68] In this case, if I had any doubt as to the applicability of s. 32 to satellite television service providers, the fact that the City did not assess the applicants for more than ten years would support an interpretation of the section as not applying to them.

Residual Presumption in Favour of Taxpayer

[69] Finally, if a purposive and contextual analysis leaves any ambiguity about the scope of s. 32(1), the ambiguity should be resolved in favour of the applicants (*Placer Dome, supra*, at par. 24). They have conducted their affairs on the basis that they were not subject to business tax; and, as I said, the City proceeded on that basis for a decade.

CONCLUSION

[70] Interpreting the words of s. 32(1) in a contextual and purposive manner leads to the conclusion that the provision does not apply to satellite television service providers. While the taxation of satellite television providers does not raise the same type of policy considerations as some other cases involving the scope of a legislative provision, such as the issue of the patentability of higher life forms (*Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, the decision as to whether those enterprises should be subject to municipal business tax should be made by the legislature.

[71] In *Bishops v. Stevens*, [1990] 2 S.C.R. 467, the issue was whether the right to make “ephemeral” recordings fell within the scope of copyright protection under the *Copyright Act*. McLachlin J. (as she then was) identified

the issue in the case as arising because “the introduction of new technology presented a situation not contemplated by the drafters of the original Canadian Copyright Act in the 1920’s.” (at p. 473) She concluded that ephemeral recordings did not fall within the right to broadcast a performance under the Act. Her comments, at p. 484-5, are apt in the case at bar:

Neither the wording of the Act, nor the object and purpose of the Act, nor practical necessity support an interpretation of these sections which would place ephemeral recordings within the introductory paragraph to s. 3(1) rather than s. 3(1)(d). On the contrary, policy considerations suggest that if such a change is to be made to the Act it should be made by the legislature, and not by a forced interpretation.

REMEDY

[72] As I have found that s. 32(1) of the *MAA* does not apply to the applicants, they are entitled to a declaration to that effect.

[73] The Applicants also sought an order refunding the business taxes that they paid under protest. This remedy was not addressed at the hearing. If there is any dispute as to whether the applicants are entitled to a refund, the parties can return to argue the issue.

[74] Costs may be spoken to if they cannot be agreed upon.

J.

APPENDIX 1 - The City of Winnipeg Charter (excerpts)

Definitions

1 In this Act,

"business tax" means the business tax imposed under

(a) Part 8 (Assessment, Taxation and Other Levies on Property) on the business assessment of premises, or

(b) section 32 (business tax on cable television service) of The Municipal Assessment Act;

PART 8

ASSESSMENT, TAXATION AND OTHER LEVIES ON PROPERTY

Definitions

315(1) In this Part,

"business assessment" means the assessment of premises made under Division 1 for the purposes of business tax;

...

"premises" means land or buildings in the city, or both, or any part of land or a building, occupied or used by a person for the purpose of carrying on a business;

DIVISION 1

ASSESSMENT

BUSINESS ASSESSMENT

Municipal Assessment Act applies

316(1) The provisions of The Municipal Assessment Act, except those in section 3 and subsections 17(15) and (16) of that Act, apply to business assessment in the city.

All businesses to be assessed

316(2) Subject to subsection (3) and section 317 (specific exemptions), premises used or occupied by a person for carrying on a business in the city, whether or not the person resides in the city, must be assessed for business assessment at a sum equal to the annual rental value of the premises on the reference date.

Exception

316(3) Subsection (2) does not apply to premises

(a) used or occupied by a person for carrying on a business if the city assessor finds it impractical to determine the annual rental value of the premises; or

(b) the use of which is not for the preponderant purpose of earning a profit.

UTILITY CORPORATIONS' PROPERTY

Utility corporations' property assessments

323(1) For the purpose of assessment and taxation, the property of a corporation providing telephone services fixed or placed in a street is deemed to be real property. The city assessor must not value that property but rather must assess it by entering in each year's real property assessment roll the amount of \$1,200,000 for each corporation that provides telephone services.

Liability of corporation for other tax

323(2) A corporation that has property assessed under subsection (1) is not exempt from real property tax on other real property owned by the corporation on the ground that it is liable for tax on that assessment.

Telephone companies

324 A corporation providing telephone service that pays real property tax for property fixed or placed in a street, and deemed by section 323 to be real property, is not subject to business tax for premises, or a part of them, used or occupied by the corporation for housing its telephone exchange and switching equipment.

DIVISION 2 TAXATION LIABILITY FOR TAXES

Liability for real property taxes

332(1) Each person in whose name real or personal property in the city is assessed is liable to pay to the city real or personal property taxes imposed under this Act in respect of the property, except where the person or the property is exempted under this or any other Act from payment of such taxes.

Liability for business tax or fee

332(2) Each person in whose name business is carried on in the city or in whose name business premises are assessed is liable to pay to the city business tax or a license fee, except where the person or the premises are exempted under this or any other Act from payment of business tax or the licence fee.

APPENDIX 2 - The Municipal Assessment Act (excerpts)

Business tax on cable television service

32(1) Where a person, within a municipality, provides a television reception service by means of, in whole or in part, cables, wires and other equipment or facilities, the person, in providing the television reception service and related services, is deemed to be carrying on a business in the municipality and is liable in each year to payment of a business tax to the municipality equal to 1% of the gross revenue of the business in the year that precedes the year for which the tax is payable.

"Gross revenue"

32(2) For purposes of this section, "gross revenue" means gross revenue that is received in payment of fees or other charges for the television reception service provided in the municipality and does not include provincial sales tax that is collected as an agent of the Crown.

32(3) Repealed, S.M. 1998, c. 34, s. 12.

Annual report of gross revenues

32(4) A person who is liable to payment of a business tax to a municipality under subsection (1) shall, on or before March 1, file with the assessor for the municipality a return showing the gross revenue of the person in the preceding year.

Subsection 32(1) business tax replaces usual tax

33(1) Subject to subsection (2), a business tax under subsection 32(1) is in the place of and replaces a business tax that is otherwise payable to a municipality with respect to the cables, wires or other equipment or facilities that are used in providing a television reception service.

Business premises tax payable

33(2) Notwithstanding subsection (1), a person who operates a business to which subsection 32(1) applies is liable for the payment of a business tax that is imposed and levied with respect to premises in which the business is carried on in the municipality.