

Standard Sausage Co. v. Lee (1933) 4 D.L.R. 501 and (1934) 1 D.L.R. 706 which held the Food and Drugs Act to be intra vires as being a valid exercise of the criminal law power under S. 91(27) of the B.N.A. Act.

Then, following a review of the jurisprudence, Mr. Justice Berger was of the opinion that the Province has the exclusive jurisdiction to say when and where sanctions of the criminal law should be applied and to the extent S. 2(2) of the Code purports to confer such authority on the Attorney General of Canada it is ultra vires. He stated:

"It comes to this: has Parliament the power not only to prescribe the rules for the enforcement of the law, but also to decide who should enforce the law, and against whom? The argument on behalf of the Attorney General of Canada, if acceded to, would mean that the federal Government has the power to determine whether a prosecution shall be brought or an appeal taken in proceedings brought under any statute enacted by Parliament pursuant to the criminal law power, for the argument advanced in the case at bar to justify the preferring of the indictment are based entirely on S. 91(27). That would include the Criminal Code as well as the Food and Drugs Act. It would mean that Parliament could pass legislation authorizing the Attorney General of Canada to decide whether a prosecution should be brought in a shoplifting case at Burns Lake, or an appeal should be taken from an acquittal by a Provincial Court Judge in Pouce Coupe in a breaking and entering case. But these are matters for the Attorney General of the Province, not the Attorney General of Canada. So also is the preferring of an indictment under the Food and Drugs Act."

FEDERAL COURT OF APPEAL UPHOLDS CRTC
APPROVAL OF B.C. TELEPHONE ACQUISITION

The Federal Court of Appeal, in an unanimous decision by Pratte, Heald and Urie, J J. on December 23, 1980, upheld the approval by the Canadian Radio-Television and Telecommunications Commission (CRTC) of the acquisition by the British Columbia Telephone Company of GTE Automatic Electric (Canada) Limited.

At the time relevant to the appeal Automatic Electric, a manufacturer of telephone equipment, was a wholly owned subsidiary of General Telephone and Electronics Corporation

which was and is the ultimate controlling shareholder in B.C. Telephone through Anglo-Canadian Telephone Company. Automatic Electric in turn owned GTE Lenkurt Electric (Canada) Limited which specialized in telecommunications transmission equipment. In effect the decision permitted B.C. Telephone to acquire Automatic Electric although the ultimate control of both companies remained in the hands of General Telephone and Electronics Corporation. Also involved was the acquisition by B.C. Telephone of Microtel Pacific Research Limited, a recently formed research company. In a subsequent corporate reorganization Automatic Electric, Lenkurt and Microtel became a single firm under the name of AEL-Microtel under the ownership of B.C. Telephone.

B.C. Telephone's application to the CRTC for approval of the acquisition was made pursuant to s. 9A of the Act to Incorporate The British Columbia Telephone Company, which requires that such acquisitions be "approved" by the CRTC. The application was opposed by the Consumers Association of Canada. The Director of Investigation and Research under the Combines Investigation Act and three other intervenors participated in the public hearings before the CRTC. The Director's position was that the acquisition could result in foreclosure of the B.C. Telephone equipment market to competitors of Automatic Electric and lead to higher than necessary equipment costs. He argued that the application should be denied, or, if approved B.C. Telephone should be required to institute competitive bidding procedures. At the hearing of the appeal, submissions on the merits were made by Counsel for the Parties, the Director and the National Anti-Poverty Organization.

In its decision, which was rendered on September 18, 1979, the CRTC noted the absence of statutory criteria for approval under B.C. Telephone's Act of incorporation but decided to consider the case on the basis of public interest. It concluded that the evidence on public interest was equally balanced. It approved the application subject to certain conditions relating to the treatment of the proposed investment for regulatory purposes in order to protect telephone subscribers from undesirable subsidization of Automatic Electric by B.C. Telephone.

At the Appeal, Counsel for the Consumers Association relied largely on a submission that the CRTC had committed an error in law, arguing that under s. 9A the application should only have been approved after the acquisition had been positively demonstrated to be in the public interest. Heald, J. rejected that submission, stating in part:

"The section itself sets out no criteria which the Commission is required to consider when exercising its power of approval or disapproval of an agreement of this kind. The Commission is, in my opinion, free to formulate and apply its own guidelines. It is the master of its own procedure."

Pratte, J., in concurring reasons for judgment, noted that the Applicant's submission was based on the position that the word "approved" in s. 9A required the CRTC to find that the acquisition was good with reference to the public interest. Rejecting that position, he stated:

"As I read section 9A, the Commission is given an entire discretion to approve or not to approve as it sees fit. It is not, in my view, within the power of the Court to limit that discretion by imposing to the Commission the duty to make its decision by reference to precise criteria or standards."

As noted above, the Director of Investigation and Research argued before the CRTC that, if it approved the application, it should require B.C. Telephone to institute competitive bidding procedures. In its final argument before the CRTC, B.C. Telephone stated certain purchasing principles. The CRTC, in its decision, ordered B.C. Telephone to file within two months the specific procedures it intended to introduce. In doing so, B.C. Telephone stated:

"To ensure that B.C. Tel obtains the most advantageous price for all categories of telecommunications equipment, purchases are to be made by using tendering or request for proposal procedures as outlined in this procedure."

The CRTC, after receiving comments from the Director of Investigation and Research and the Consumers Association, approved the procedures on January 29, 1981.