Federal Court of Appeal | Cour d'appel fédérale

Date: 20220817

Docket: A-182-21

Citation: 2022 FCA 145

CORAM: **STRATAS J.A.**
RENNIE J.A.
MACTAVISH J.A.

BETWEEN:

KOBE MOHR

Appellant

and

NATIONAL HOCKEY LEAGUE, AMERICAN HOCKEY LEAGUE INC., ECHL INC., CANADIAN HOCKEY LEAGUE, QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC., ONTARIO HOCKEY LEAGUE, WESTERN CANADA HOCKEY LEAGUE AND HOCKEY CANADA

Respondents

Heard by online video conference hosted by the Registry, on January 12, 2022.

Judgment delivered at Ottawa, Ontario, on August 17, 2022.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: STRATAS J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

Background

[1] The Court is seized with two questions of statutory interpretation. The provisions in question are sections 45 and 48 of the *Competition Act*, R.S.C. 1985, c. C-34, the full text of which is found in Annex A to these reasons.

[2] In broad terms, section 45 of the *Competition Act* prohibits conspiracies, agreements or arrangements between competitors to fix or maintain prices, allocate markets or customers, or restrict markets for the production or supply of a product. If established, the anti-competitive effect of the agreement is presumed, giving rise to both criminal sanctions and civil remedies.

[3] Section 48 addresses conspiracies or arrangements in the context of professional sport. Again, in broad terms, section 48 prohibits agreements or arrangements which unreasonably limit the opportunities of a player to participate in professional sport, impose unreasonable terms on players, or unreasonably limit the ability of players to negotiate with and play with a team of their choice. The purpose of section 48 is to protect freedom of employment for players (John Barnes, *The Law of Hockey* (LexisNexis, 2010) at p. 322 [Barnes]). Like section 45, a breach of section 48 gives rise to criminal sanctions and civil remedies.

[4] There are two key differences between conspiracies under sections 45 and 48. If established, a conspiracy under section 45 is deemed anti-competitive. In contrast, under section 48, a court must take certain matters into account before determining that a conspiracy has been

established. This includes the desirability of maintaining a balance among teams competing in the same league. In effect, section 48 exempts certain agreements or arrangements made in the context of professional sport from the general prohibition against anti-competitive agreements in section 45 of the *Competition Act*.

[5] The scope of these two provisions and their interrelationship lies at the heart of the interpretive questions before us.

[6] The appellant commenced a class proceeding alleging that the respondents conspired, contrary to paragraphs 48(1)(*a*) and (*b*), to limit the opportunities of hockey players to play in Canadian major junior and professional hockey leagues. The appellant sought damages under paragraph 36(1)(*a*) of the *Competition Act* for economic losses suffered as a result of the alleged conspiracy.

[7] The respondents moved to strike the appellant's statement of claim on the basis that it disclosed no reasonable cause of action. They argued that section 48 of the Act did not, and could not, apply to the facts as framed in the statement of claim.

[8] In response to the motion to strike, the appellant moved to amend the statement of claim, adding an allegation of a conspiracy under section 45 of the Act. The notice of motion seeking leave to amend referred to "both intra- and inter-league … [conspiracies that] … may perhaps be governed by one or the other of sections 45 and 48."

[9] The Federal Court (*per* Crampton C.J., 2021 FC 488) found that it was plain and obvious that the appellant's claim did not disclose a cause of action under section 48. The Court also dismissed the motion for leave to amend to advance the claim under section 45 on the ground that the amendments did not plead a conspiracy within the scope of section 45.

[10] In this context, questions of statutory interpretation are subject to a correctness standard of review, and I agree with the appellant that the Federal Court made errors (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 72). The Court misunderstood its role on a motion to strike. There were also errors in the method of statutory interpretation; to be precise, in the use of extrinsic evidence on a motion to strike and the role of ambiguity in statutory interpretation. The Court also erred in its understanding of a component of subsection 48(3).

[11] I will discuss these errors later. However, it is sufficient to note at this point that they are of no consequence. The result reached by the Federal Court was nevertheless correct and so I would dismiss the appeal.

[12] The statement of claim, alleging as it does a conspiracy between leagues and between leagues and other organizations, has no reasonable prospect of success. The prohibition on anti-competitive arrangements in section 48 is limited to arrangements or agreements between clubs or teams in the same league. The proposed amended statement of claim, asserting as it does a conspiracy with respect to the *purchase or acquisition* of players' services, also has no

reasonable prospect of success. The prohibition in section 45 is restricted to agreements or arrangements with respect to the *supply or sale* of products.

The interpretation of section 48

[13] A statute is to be read in its entire context, in its grammatical and ordinary sense, harmonious with the scheme and object of the statute. Sometimes legislative history can shed light on the matter. When the words of a statute are unequivocal, the ordinary meaning plays a dominant role in the interpretative process (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 at para. 88).

[14] The Court's task is to discern the meaning of the words used by Parliament when it chose to enact its policy preferences. There is no room for the Court to inject its own policy preferences into the analysis. In this case, it is not for this Court to say whether section 48 is or is not a good thing. Our task is just to discern what Parliament chose to enact (*TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144).

[15] Section 48 cannot be read, consistent with these principles, to mean that the prohibitions against anti-competitive arrangements in subsection 48(1) apply to interleague conspiracies as pleaded in the statement of claim. To properly understand the scope of subsection 48(1) we must look to plain text of subsection 48(3) which reads as follows:

(3) This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of	**(3)** Le présent article s'applique et l'article 45 ne s'applique pas aux accords et arrangements et aux

agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section does not apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.	dispositions des accords et arrangements conclus entre des équipes et clubs qui pratiquent le sport professionnel à titre de membres de la même ligue et entre les administrateurs, les dirigeants ou les employés de ces équipes et clubs, lorsque ces accords, arrangements et dispositions se rapportent exclusivement à des sujets visés au paragraphe (1) ou à l'octroi et l'exploitation de franchises dans la ligue; toutefois, c'est l'article 45 et non le présent article qui s'applique à tous les autres accords, arrangements et dispositions d'accords ou d'arrangements conclus entre ces équipes, clubs et personnes.

[16] The phrase "as members of the same league" must be given its plain, ordinary and otherwise clear meaning. The subsection also refers to "the granting and operation of franchises in the league …". Coherence within the subsection is reinforced by understanding the phrase in its plain and ordinary sense. While there could be some discussion around the boundaries of what constitutes a "league", this point was not argued before us (Barnes at p. 322).

[17] Subsection 48(3) allocates agreements and provisions "between or among teams and clubs…of the same league" that "relate exclusively to matters described in subsection [48](1)" to "appl[y]" under section 48 only. Conversely, it allocates "all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons" to section 45 only. Thus, subsection 48(3) evidences a clear parliamentary intention to avoid overlapping or conflicting applications of section 45 and 48. Every agreement or provisions must "appl[y]" under either section 45 or 48.

[18] Interleague agreements are not "between or among teams and clubs engaged in professional sport as members of the same league." Parliament clearly did not intend to apply two contradicting penal standards to interleague conspiracies. But if interleague agreements were caught by section 48, this is exactly what could happen. This demonstrates that Parliament did not intend to apply section 48 to interleague agreements.

[19] Parliament was also consistent in the language and design of section 48. Paragraphs 48(2)(*a*) and (*b*) describe criteria to be considered in determining whether the prohibition against anti-competitive arrangements in subsection 48(1) has been violated. This includes, in paragraph 2(*b*) "the desirability of maintaining a reasonable balance among the teams or clubs participating *in the same league*" (emphasis added).

[20] Two points may be said about this. First, consistent with subsection (3), the focus of paragraph (2)(*b*) is on teams "in the same league". The second is that paragraph (2)(*b*) would be redundant, if not nonsensical, if the scope of subsection 48(3) were widened to include other leagues and umbrella organizations such as the respondent Hockey Canada, as argued by the appellant. The rule against tautological interpretations would be breached (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at § 8.23 [*Sullivan*]).

[21] Other provisions in the Act support the conclusion that subsection 48(3) means what it says. Section 6 of the *Competition Act* addresses amateur sport. Subsection 6(1) states: "This Act

does not apply in respect of agreements or arrangements between or among teams, clubs and leagues pertaining to participation in amateur sport."

[22] By its terms, subsection 6(1) applies to both intraleague and interleague agreements, whereas subsection 48(3) references only intraleague agreements. By the choice of words "between or among" teams, clubs and leagues in subsection 6(1), Parliament demonstrated an understanding of the distinction between intraleague and interleague agreements. It chose in subsection 6(1) to reference both, and in subsection 48(3) to reference only intraleague agreements. The principle of implied exclusion or *expressio unius est exclusio alterius* is engaged: the legislature's failure to mention something can be a ground for inferring it was deliberately excluded (*Sullivan* at § 8.89-8.91).

[23] To conclude, where the words are precise and unequivocal, as they are here, the ordinary meaning plays a dominant role in the interpretation. As I will explain, the arguments advanced by the appellant do not shake the conclusion that the conspiracy provisions of section 48, when given their ordinary meaning, are confined to intraleague agreements.

The appellant's arguments on the interpretation of section 48

[24] The appellant contends that subsection 48(3) does not limit subsection 48(1) to intraleague conspiracies; rather, subsection 48(3) simply removes those types of conspiracies from the general conspiracy prohibition in section 45 and makes them subject to the mitigating considerations outlined in subsection 48(2). Consequently, "what has not been removed from

section 45, namely conspiracies that are not confined to teams within a single league, remains within the purview of subsection 48(1)" (Reasons at para. 71).

[25] This argument fails. I agree with the Federal Court when it concluded that to interpret subsection 48(1) in this manner would defeat the ordinary meaning of the language of subsection 48(3) which explicitly limits the application of section 48 to teams that are members of the same league. I also agree with the Federal Court that this interpretation would lead to an absurd bifurcation of the conspiracy provisions in the context of professional sport (Reasons at para. 74).

[26] Next, the appellant argues that the Federal Court erred in its understanding of the requirement in subsection 48(3) that the agreement, arrangement or provision "relate exclusively to matters described in subsection (1)" (*Competition Act*, s. 48(3)). Here, I agree with the appellant that the Federal Court erred in striking the claim on the basis that allegations did not relate exclusively to the matters in subsection 48(1).

[27] The general prohibition against conspiracies in subsection 48(1) is subject to a caveat in subsection 48(3), which requires that intraleague agreements, arrangements and provisions "relate exclusively to matters described in subsection (1)."

[28] The aim of section 48 is to protect the economic freedom of hockey players (Barnes at pp. 322-24). To this end, section 48 identifies three behaviours that are anti-competitive: unreasonable limits on opportunities to participate (para. 48(1)(*a*)), unreasonable terms and

conditions imposed on participants (para. 48(1)(*a*)), and unreasonable limits on the opportunity to negotiate with and play for the team of choice (para. 48(1)(*b*)). These are the anti-competitive practices to which the agreements or arrangements must relate exclusively.

[29] The Federal Court referenced allegations in the statement of claim which, in its view, were beyond the remit of paragraphs 48(1)(*a*) and (*b*) and in so doing erred (Reasons at paras. 68, 70-75, 85).

[30] A description of how the conspiracy works does not offend the requirement that the allegations "relate exclusively". The means are not to be confused with the effect. A description of the corporate, partnership and other organizations and the arrangements put in place by which the anti-competitive terms and conditions are imposed on the players does not fall within the scope of what must "relate exclusively". What must "relate exclusively" pertains to the asserted anti-competitive allegations. Concerns relating to the terms and conditions of the standard player agreement, including provisions for equipment, scholarships, travel (proposed amended statement of claim at para. 28.4), for training and development (at para. 47.5), provisions relating to trading of players, and consequences of non-performance all fall within the ambit of paragraphs 48(1)(*a*) or (*b*).

[31] There remains a final argument raised by the appellant. He contends that the introductory words of subsection 48(1), which make it an offence for "[e]very one" to unlawfully conspire to limit the opportunities of players, demonstrate that Parliament intended to cast a wide net,

including persons and corporations not part of the same league, but who or which have agreements with a league.

[32] I do not agree. In the specific context of the *Competition Act*, "[e]very one" reflects Parliament's intention to make corporations, partnerships, individuals, leagues, clubs, teams, governing bodies, and umbrella organizations subject to the civil and criminal sanctions of the sports conspiracy provision. But the breadth of that word does not override subsection 48(3), where, by its plain terms, Parliament deliberately limited the sports conspiracy provision to intraleague agreements.

The interpretation of section 45

[33] Section 45 applies where the anti-competitive agreement is between teams of different leagues or between umbrella organizations and teams or leagues. There is, however, an important caveat to the sweep of this provision. Section 45 is limited to agreements between competitors to fix prices or allocate markets relating to "the production or supply" of a product or a service—otherwise known as "sell-side" conspiracies.

[34] The plain meaning of *production or supply* leads to the conclusion that section 45 is limited to conspiracies relating to the provision, sale and distribution of products or services. It stands in contrast to *purchase and acquire*. While, as noted by the Federal Court, there may be circumstances in which section 45 could capture purchasers, that is not in issue before us (Reasons at para. 43). As the proposed amended statement of claim describes a conspiracy relating to the terms and conditions under which the leagues and teams purchased or acquired

services of the players, the allegation under section 45 has no hope of success (see, *e.g.*, proposed amended statement of claim at para. 2.7).

[35] This understanding of section 45 is confirmed by its legislative history. (Later in these reasons I will explain how legislative history informs the statutory interpretation exercise.)

[36] In March 2010, paragraph 45(1)(*c*) of the *Competition Act* was amended. The provision, prior to amendment, read:

Conspiracy	**Complot**
45(1) Every one who conspires, combines, agrees or arranges with another person (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product, (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof, (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or (d) to otherwise restrain or injure competition unduly, is guilty of an indictable offence and liable to imprisonment for a term not	**45(1)** Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne : a) soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque; b) soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix; c) soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le

exceeding five years or to a fine not exceeding ten million dollars or to both.

prix d'assurances sur les personnes ou les biens;

d) soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.

[37] Section 45, post amendment, reads:

Conspiracies, agreements or arrangements between competitors

45(1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

…

Definitions

(8) The following definitions apply in this section.

competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred

Complot, accord ou arrangement entre concurrents

45(1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement :

a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;

b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;

c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

Définitions

(8) Les définitions qui suivent s'appliquent au présent article.

concurrent S'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence d'un complot, d'un accord ou d'un arrangement visant à faire l'une des choses

to in paragraphs (1)(a) to (c). (*concurrent*)	prévues aux alinéas (1)a) à c). (*competitor*)
price includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product. (*prix*)	***prix*** S'entend notamment de tout escompte, rabais, remise, concession de prix ou autre avantage relatif à la fourniture du produit. (*price*)

[38] Gone from the current version is the requirement that the agreement "unduly" affect competition. It is no longer necessary to establish that these agreements have anti-competitive effects. Agreement alone is now sufficient—the anti-competitive effect is presumed. Gone too is the word "purchase" from paragraph 45(1)(*c*), confining the scope of section 45 to supply or sell-side conspiracies. Lest there be any doubt, the words "for the supply of the product" were added to the new paragraph 45(1)(*a*) (price-fixing) and the words "production or supply of the product" to paragraphs 45(1)(*b*) and (*c*) offences (market and supply restrictions).

[39] Contemporaneous with the amendments to section 45, section 90.1 was added to provide civil recourse, at the instance of the Competition Bureau, for any arrangements or agreements which have anti-competitive effects. While section 90.1 is generic in scope, it could encompass buy-side conspiracies, such as those that are founded on the purchase and acquisition of goods and services.

[40] Section 45 has been considered by two courts: *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*, 2018 ABQB 482, 17 Alta. L.R. (7th) 83 [*Dow Chemical*] and *Latifi v. The TDL Group Corp.*, 2021 BCSC 2183, 2021 CarswellBC 3523 at paras. 72 and 73 [*Latifi*]. In both cases the courts also reached the conclusion that section 45 only prohibits arrangements between suppliers and not buy-side or purchaser agreements.

The appellant's arguments with respect to section 45

[41] The appellant does not mount a credible argument in response to either the language of the section or its legislative history. In his memorandum of fact and law, the appellant argues that the legislative history is inconclusive on the point (para. 24), the language itself is not conclusive (paras. 25 and 134) and "it is not plain and obvious that Parliament intended that section 90.1, but not section 45, would apply to Buy-Side Conspiracies" (para. 133).

[42] These arguments are not persuasive. When given its plain meaning, section 45 does not apply to the agreements which form the foundation of the conspiracy pleaded in the proposed amended statement of claim. In light of this conclusion, it is unnecessary to deal with the subsidiary arguments concerning whether the Federal Court erred in its findings concerning the particularity of the pleading. It is also unnecessary to deal with the Federal Court's finding that the duplication in the statement of claim of two allegations also advanced in class actions in other courts constituted an abuse of process.

[43] During oral argument, the Court asked questions about whether the appellant, also a class member in those other class proceedings, could bring his own class proceeding—effectively opting out of those proceedings or affecting its potential finality—after the opt-out period in those proceedings had expired. This concern, effectively another variant of abuse of process, was not considered by the Federal Court and the parties were not prepared to argue it and so the Court will not discuss it further. In the future, on similar facts, the parties may well wish to address it. In making this observation I note that the claim in this case was for statutory damage under section 36 of the *Competition Act*, a claim not advanced in the other courts.

[44] I now turn to the errors in the reasons of the Federal Court.

The role of a judge on a motion to strike

[45] The appellant contends that the judge conflated the role of the court on a motion to strike with the role of the court on the merits. He argues that the judge reached his own conclusion on a contested point of statutory interpretation rather than answering the question of whether the plaintiff's proposed interpretation had a reasonable chance of success. The point is reflected in paragraph 72 of the Reasons:

> I acknowledge that the language in subsection 48(3) is capable of being interpreted in the manner advanced by the Responding Defendants as well as in the manner asserted by the plaintiff. However, for the following reasons, I agree with the interpretation advanced by the Responding Defendants.

[46] I agree with the appellant. This is an incorrect analytical approach to a motion to strike. The error in paragraph 72 is continued in paragraph 73 where the Federal Court concludes that "the interpretation advanced by the Responding Defendants fits more comfortably with the overall scheme of section 48 …".

[47] Once a judge finds that legislation is capable of being interpreted in at least two different ways, it is not open to the judge to conclude that it is plain and obvious that the action has no reasonable chance of success.

[48] Courts must be careful not to inhibit the development of the law by applying too strict an approach to motions to strike. The law must be allowed to evolve to respond to new issues and factual matrices. Therefore, statements of claim are to be read generously with a view to

accommodating any inadequacies in the allegations. The fact that the law has not yet recognized a particular claim, interpretation, or cause of action is not determinative of the outcome of the motion. Novel but arguable claims must be allowed to proceed to trial as new developments in the law often find their provenance in surviving motions to strike (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 21 [*Imperial Tobacco*]). As an example of how restraint in the application of motions to strike contributes to the evolution of the law, see the treatment of the plea of non-infringing alternative in patent litigation: *Merck & Co., Inc. v. Apotex Inc.*, 2012 FC 454, 408 F.T.R. 139 (Eng.); *Apotex Inc. v. Merck & Co.*, 2015 FCA 171, 387 D.L.R. (4th) 552.

[49] There is, however, a countervailing principle. Motions to strike serve an important screening or gatekeeping function. They are essential to effective and fair litigation and prevent unnecessary effort and expense being devoted to cases that have no reasonable prospect of success. This is particularly true in the context of class actions, where plaintiffs may have fundraised to cover their expenses and where they are relieved from paying costs when they are unsuccessful on interlocutory matters along the way.

[50] There is also a broad cost to access to justice. The diversion of scarce judicial resources to cases which have no substance diverts time away from cases that require attention. The point was well made by Stratas J.A. in *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143, 229 A.C.W.S. (3d) 935 at paragraph 13 when he wrote that "[d]evoting resources to one case for no good reason deprives the others for no good reason."

[51] The appellant contends that as the interpretive questions before the Federal Court had not been previously considered, they could not be conclusively considered to be bereft of success. The appellant presses the proposition further and, relying on the decision of this Court in *Arsenault v. Canada*, 2008 FC 299, 330 F.T.R. 8 at para. 27, aff'd., 2009 FCA 242, 395 N.R. 377 [*Arsenault*], says that to succeed on a motion to strike, there must be a binding decision which has definitively determined the point in question. In this case there has been no judicial consideration of section 48 and limited tangential consideration of section 45. This, he contends, required that the motion to strike be dismissed.

[52] As a general proposition, definitive legal pronouncements on the meaning of legislation should not be made on a motion to strike where there are competing, credible interpretations. A motions judge should not reach a conclusion on an honestly disputed point of statutory interpretation—there is no "correct" or preferred interpretation on a motion to strike. The only task is to determine whether there is a conflicting interpretation worth considering or that has a reasonable prospect of success. The low bar for determining whether a claim has a reasonable prospect of success applies equally where a question of statutory interpretation is at the heart of the motion to strike (*Apotex Inc. v. Laboratoires Servier*, 2007 FCA 350, 286 D.L.R. (4th) 1 at para. 34).

[53] That said, a cause of action is not presumptively "reasonable" simply because it has no antecedence in jurisprudence. Some legal analysis may be needed to determine if a claim has any reasonable prospect of success (*McCain Foods Limited v. J.R. Simplot Company*, 2021 FCA 4, [2021] F.C.J. No. 37 (QL) at para. 21; *Das v. George Weston Limited*, 2018 ONCA 1053, 43

E.T.R. (4th) 173 at para. 75; *Merck & Co. Inc. v. Apotex Inc.*, 2014 FC 883, 128 C.P.R. (4th) 410 at para. 38). There is a duty to assess the reasonableness or viability of a plea and separate the wheat from the chaff. This aligns with the obligation of courts to improve the affordable, timely and just adjudication of civil claims (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at paras. 2, 28-29, 31-33).

[54] Therefore to insist, as does the appellant, that the absence of a definitive precedent on the meaning of sections 45 and 48 would significantly reduce the utility of motions to strike in cases of statutory interpretation. It would mean that every case which raised a point of interpretation for the first time, no matter how futile the argument, would survive a motion to strike, as there would never be a precedent, let alone a binding precedent. Although the judge used incorrect terminology, he did not err in conducting some legal analysis to determine whether the claim had any reasonable prospect of success, and that analysis supported his conclusion that the claim had no reasonable prospect of success.

Evidence on motions to strike

[55] The Federal Court concluded that section 45 only prohibited supply-side conspiracies. It reached this conclusion after a review of the text of section 45, its legislative history, Parliamentary committee reports and policy statements by the Competition Bureau (Department of Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada* (November, 1973) and Standing Senate Committee on Banking, Trade and Commerce, Issue No. 61 (19 November 1975) at 18-19).

[56] Rule 221(2) of the *Federal Courts Rules*, S.O.R./98-106, provides that no evidence shall be heard on a motion to strike for an order under paragraph (1)(*a*).

[57] This legislative prohibition against the use of evidence on a motion to strike is underlined by solid policy considerations. There are no affidavits or cross-examinations. The Court has neither the assurance that it has the complete picture nor that the "evidence" that it does have is credible. Relying on extrinsic evidence on a motion to strike makes it unclear as to whether the result was reached as a matter of law following the application of the principles of statutory interpretation, or whether it was reached based on the extrinsic evidence. The line between jurisprudence and evidence blurs. The waters become muddy. That is the case before us.

[58] A motion to strike pleadings is different from other creatures under the Rules: a ruling on a question of law or a summary judgment motion. Each of these motions has its proper place and for good reasons they should not be smudged together.

[59] To allow evidence in a pleadings motion would quickly make it just an early summary judgment motion, but stripped of the requirements for summary judgment motions (*i.e.* leading the best case, filing the motion only after defence). The parties would be filing evidence before all of the issues are on the table (no defence has been filed). The evidence could be wrong or incomplete.

[60] The error of the Federal Court was to treat the extrinsic evidence as relevant to the statutory interpretation issue before us. Policy statements of the regulator do not tell us what a

statute means. Our focus is the statute, not how people have been using it. The Federal Court used the debates and proceedings not as context to inform the statutory interpretation analysis but instead as corroboration of its interpretation.

[61] As noted, section 45 has been previously considered (*Dow Chemical* and *Latifi*). In both cases the court reached the conclusion that section 45 only applied to prohibit arrangements between suppliers, and in both cases the court reached that conclusion without regard to the extrinsic evidence. In fact, in *Latifi*, the Court questioned the appropriateness of the Federal Court's reliance on extrinsic evidence to understand the meaning of section 45, and concluded that "even if … admissible" it was of little weight (*Latifi* at paras. 73-74).

[62] In other words, the Federal Court could have reached the same result without relying on the extrinsic evidence.

[63] I accept that legislative history may be used on a motion to strike as it may inform the purpose of the legislation (*Alberta (Attorney General) v. British Columbia (Attorney General)*, 2021 FCA 84, 41 C.E.L.R. (4th) 157 at para. 127). But even here, care must be taken not to confuse the evolution of the legislation, which is law, with what individual politicians or regulators think or hope the legislation says. There is a substantive difference between committee proceedings that shed light on the evolution and legislative history of a law on the one hand and on the other hand the testimony of academics and public servants which may be aspirational, disputable or of arguable relevance. While perhaps self-evident, if it is necessary to resort to

Hansard to discern the meaning of a statute, it is difficult to conclude that it is plain and obvious that a plaintiff's case has no reasonable prospect of success.

[64] In *Imperial Tobacco*, the Supreme Court considered the admissibility of evidence in the context of statutory interpretation on a motion to strike, holding that it was proper to rely on Hansard on a motion to strike a pleading. The appeal was from the British Columbia Court of Appeal, and the motion to strike was governed by the British Columbia *Supreme Court Rules*, B.C. Reg. 221/90 [BCSC Rules], as they then were. Like the *Federal Courts Rules*, Rule 19(27) of the BCSC Rules (now Rule 9-5(2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009) provided that no evidence was admissible on a motion to strike a statement of claim for failure to disclose a reasonable cause of action. Nonetheless, the Court opined that courts "may" consider all evidence relevant to statutory interpretation in order to discern legislative intent (*Imperial Tobacco* at para. 128).

[65] Two points can be said about *Imperial Tobacco.*

[66] First, and at risk of repetition, if a court must resort to material beyond the statute and its legislative history to answer the question as to its scope and application, it is difficult to conclude that the interpretation which forms the foundation of the claim has no reasonable prospect of success. In this context, yellow lights should be flashing before any judge who needs extrinsic evidence to answer a question of statutory interpretation on a motion to strike.

[67] Second, in *Imperial Tobacco*, the Supreme Court was not asked to consider the range of procedural options available to parties in the Federal Court to resolve preliminary legal issues, several of which provide for the admission of the type of extrinsic evidence in issue here. Put otherwise, the prohibition on the use of evidence in Rule 221(2) is best understood when situated in the broader architecture of the *Federal Courts Rules*.

[68] Rule 221(1)(*a*) is the beginning point on a continuum of procedural options available to parties to resolve questions of interpretation. Rule 213 provides for summary judgment, Rule 220 allows for the determination of preliminary questions of law, and should a matter reach trial, a trial judge has the discretion to direct the parties to address a questions of law. Unlike Rule 221, evidence is admissible under each of these rules to determine a question of statutory interpretation, with all of the guarantees of completeness and credibility associated with the adversarial process. It is for the judge to determine whether there is a sufficient evidentiary foundation to answer the question.

Ambiguity and statutory interpretation

[69] Sections 45 and 48 are dual provisions – they give rise to both civil remedies and criminal prosecutions. The fact that they may be enforced criminally was a factor in the Federal Court's interpretation:

> To the extent that the words in subsection 45(1) might somehow be said to permit a broader interpretation that would bring within its scope the sorts of agreements alleged in the Amended Statement of Claim, the penal nature of that provision would entitle the defendants to the benefit of any ambiguity: *R v McLaughlin*, [1980] 2 SCR 331 at 335*; R v McIntosh*, [1995] 1 SCR 686 at 702 and 705.
>
> (Reasons at para. 47)
> …

> To the extent that there is any ambiguity in section 48, which is a penal provision, the Responding Defendants are entitled to the benefit of their narrower interpretation: see paragraph 47 above.
>
> (Reasons at paras. 85 and 139)

[70] There is no presumption or rule of interpretation that the benefit of the doubt on a question of statutory interpretation goes to the defendant.

[71] The principle of strict construction of penal statutes exists as a subsidiary interpretive device applicable only where there is a finding of a genuine ambiguity as to the meaning of a provision (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 28 [*Bell ExpressVu*]).

[72] A genuine ambiguity arises only where there are two equally plausible interpretations to choose between following the interpretation exercise. A difficulty of interpretation is not necessarily an ambiguity (*Bell ExpressVu* at paras. 54-55). A restrictive interpretation may be warranted where an ambiguity cannot be resolved by means of the usual principles of interpretation. But it is a principle of last resort that does not supersede a purposive and contextual approach to interpretation.

[73] As Professor Sullivan explains, the strict constructionist approach to the interpretation of penal statutes developed in the eighteenth century when criminal law sanctions were severe and invariably triggered incarceration. But by the 1990s that presumption began to erode to the point where it is engaged only in the limited circumstances which I have described (*R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26 at para. 38 citing R. Sullivan, *Sullivan on the Construction of*

Statutes (5th ed. 2008), at pp. 472-74; *R. v. Big River First Nation*, 2019 SKCA 117, 28 C.E.L.R. (4th) 218).

[74] In the absence of a finding of a true ambiguity, the principle of strict construction ought not to have been invoked. For the reasons I have explained, there is no ambiguity in section 45.

Appeal of the costs order

[75] The appellant appeals the award of costs against him made by the Federal Court with respect to the motion to strike. He notes that class proceedings in the Federal Court are a no-costs regime (Rule 334.39 of the *Federal Courts Rules*). The Court did not award costs on the motion to amend as the defendants did not request costs on that motion.

[76] As a general rule, the no-costs rule in class actions is engaged the moment that the defendants are made parties to a certification motion (*Campbell v. Canada (Attorney General)*, 2012 FCA 45, [2013] 4 F.C.R. 234 [*Campbell*]). The policy objectives of the no-costs regime reflected in Rule 334.39 and why they do not apply prior to certification are fully discussed by Pelletier J.A. in *Campbell*, where this Court rejects the argument that no-costs regime attaches to the proceeding itself, as contended by the appellant.

[77] Although the Federal Court did not consider the jurisprudence or Rule 334.39, no error was made in awarding costs against the appellant. The certification motion had not been filed, consequently the award of costs was not prohibited by Rule 334.39.

[78] Therefore, I would dismiss the appeal. Although the appellant was unsuccessful in the result, the appeal was an understandable response to the Federal Court's errors that I have identified. In light of this, I would not make an award of costs.

"Donald J. Rennie"
J.A.

"I agree.
David Stratas J.A."

"I agree.
Anne L. Mactavish J.A."

Annex A

***Competition Act*, R.S.C., 1985, c. C-34**	***Loi sur la concurrence*, L.R.C. 1985, ch. C-34**
Conspiracies, agreements or arrangements between competitors	**Complot, accord ou arrangement entre concurrents**
45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges	**45** (1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement :
(a) to fix, maintain, increase or control the price for the supply of the product;	a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or	b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.
Penalty	**Peine**
(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.	(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende maximale de 25 000 000 $, ou l'une de ces peines.
Evidence of conspiracy, agreement or arrangement	**Preuve du complot, de l'accord ou de l'arrangement**
(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial	(3) Dans les poursuites intentées en vertu du paragraphe (1), le tribunal peut déduire l'existence du complot, de l'accord ou de l'arrangement en se

evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

basant sur une preuve circonstancielle, avec ou sans preuve directe de communication entre les présumées parties au complot, à l'accord ou à l'arrangement, mais il demeure entendu que le complot, l'accord ou l'arrangement doit être prouvé hors de tout doute raisonnable.

Defence

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Défense

(4) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (1) à l'égard d'un complot, d'un accord ou d'un arrangement qui aurait par ailleurs contrevenu à ce paragraphe si, à la fois :

a) il établit, selon la prépondérance des probabilités :

(i) que le complot, l'accord ou l'arrangement, selon le cas, est accessoire à un accord ou à un arrangement plus large ou distinct qui inclut les mêmes parties,

(ii) qu'il est directement lié à l'objectif de l'accord ou de l'arrangement plus large ou distinct et est raisonnablement nécessaire à la réalisation de cet objectif;

b) l'accord ou l'arrangement plus large ou distinct, considéré individuellement, ne contrevient pas au même paragraphe.

Defence

(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada,

Défense

(5) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (1) si le complot, l'accord ou l'arrangement se rattache exclusivement à l'exportation de

unless the conspiracy, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) is in respect only of the supply of services that facilitate the export of products from Canada.

produits du Canada, sauf dans les cas suivants :

a) le complot, l'accord ou l'arrangement a eu pour résultat ou aura vraisemblablement pour résultat de réduire ou de limiter la valeur réelle des exportations d'un produit;

b) il a restreint ou restreindra vraisemblablement les possibilités pour une personne d'entrer dans le commerce d'exportation de produits du Canada ou de développer un tel commerce;

c) il ne vise que la fourniture de services favorisant l'exportation de produits du Canada.

Exception

(6) Subsection (1) does not apply if the conspiracy, agreement or arrangement

(a) is entered into only by parties each of which is, in respect of every one of the others, an affiliate;

(b) is between federal financial institutions and is described in subsection 49(1); or

(c) is an *arrangement*, as defined in section 53.7 of the *Canada Transportation Act*, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked, if the conspiracy, agreement or arrangement is directly related to, and reasonably

Exception

(6) Le paragraphe (1) ne s'applique pas au complot, à l'accord ou à l'arrangement :

a) intervenu exclusivement entre des parties qui sont chacune des affiliées de toutes les autres;

b) conclu entre des institutions financières fédérales et visé au paragraphe 49(1);

c) constituant une *entente* au sens de l'article 53.7 de la *Loi sur les transports au Canada*, autorisée par le ministre des Transports en application du paragraphe 53.73(8) de cette loi, dans la mesure où l'autorisation n'a pas été révoquée et le complot, l'accord ou l'arrangement est directement lié à l'objectif de l'entente et raisonnablement nécessaire à la réalisation de cet objectif.

necessary for giving effect to, the objective of the arrangement.

Common law principles — regulated conduct

(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

Principes de la common law — comportement réglementé

(7) Les règles et principes de la common law qui font d'une exigence ou d'une autorisation prévue par une autre loi fédérale ou une loi provinciale, ou par l'un de ses règlements, un moyen de défense contre des poursuites intentées en vertu du paragraphe 45(1) de la présente loi, dans sa version antérieure à l'entrée en vigueur du présent article, demeurent en vigueur et s'appliquent à l'égard des poursuites intentées en vertu du paragraphe (1).

Definitions

(8) The following definitions apply in this section.

competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c). (*concurrent*)

price includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product. (*prix*)

Définitions

(8) Les définitions qui suivent s'appliquent au présent article.

concurrent S'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence d'un complot, d'un accord ou d'un arrangement visant à faire l'une des choses prévues aux alinéas (1)a) à c). (*competitor*)

prix S'entend notamment de tout escompte, rabais, remise, concession de prix ou autre avantage relatif à la fourniture du produit. (*price*)

Where application made under section 76, 79, 90.1 or 92

45.1 No proceedings may be commenced under subsection 45(1) against a person on the basis of facts

Procédures en vertu des articles 76, 79, 90.1 ou 92

45.1 Aucune poursuite ne peut être intentée à l'endroit d'une personne en application du paragraphe 45(1) si les

that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

faits au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien d'une ordonnance à l'endroit de cette personne demandée par le commissaire en vertu des articles 76, 79, 90.1 ou 92.

Conspiracy relating to professional sport

48 (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or

(b) to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league

is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Complot relatif au sport professionnel

48 (1) Commet un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal et un emprisonnement maximal de cinq ans, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :

a) soit pour limiter déraisonnablement les possibilités qu'a une autre personne de participer, en tant que joueur ou concurrent, à un sport professionnel ou pour imposer des conditions déraisonnables à ces participants;

b) soit pour limiter déraisonnablement la possibilité qu'a une autre personne de négocier avec l'équipe ou le club de son choix dans une ligue de professionnels et, si l'accord est conclu, de jouer pour cette équipe ou ce club.

Matters to be considered

(2) In determining whether or not an agreement or arrangement contravenes subsection (1), the court before which the contravention is alleged shall have regard to

Éléments à considérer

(2) Pour déterminer si un accord ou un arrangement constitue l'une des infractions visées au paragraphe (1), le tribunal saisi doit :

a) d'une part, examiner si le sport qui aurait donné lieu à la violation

(a) whether the sport in relation to which the contravention is alleged is organized on an international basis and, if so, whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada; and

(b) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league.

est organisé sur une base internationale et, dans l'affirmative, si l'une ou plusieurs des restrictions ou conditions alléguées devraient de ce fait être acceptées au Canada;

b) d'autre part, tenir compte du fait qu'il est opportun de maintenir un équilibre raisonnable entre les équipes ou clubs appartenant à la même ligue.

Application

(3) This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section does not apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.

Application

(3) Le présent article s'applique et l'article 45 ne s'applique pas aux accords et arrangements et aux dispositions des accords et arrangements conclus entre des équipes et clubs qui pratiquent le sport professionnel à titre de membres de la même ligue et entre les administrateurs, les dirigeants ou les employés de ces équipes et clubs, lorsque ces accords, arrangements et dispositions se rapportent exclusivement à des sujets visés au paragraphe (1) ou à l'octroi et l'exploitation de franchises dans la ligue; toutefois, c'est l'article 45 et non le présent article qui s'applique à tous les autres accords, arrangements et dispositions d'accords ou d'arrangements conclus entre ces équipes, clubs et personnes.

FEDERAL COURT OF APPEAL

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