《2003 年廣播（修訂）條例草案》委員會

政府當局就二零零四年三月一日會議上提出的事項所作的回應

目的

本文件載述政府當局就條例草案委員會在本年三月一日會議上提出的事項所作的回應。

免責辯護條款（會議紀要第 5(a）段）

2. 在不同的法例中，也有爲被起訴的人提供免責辯護條款，如該人能證明他／她已採取合理的預防措施，並已作出所有應盡的努力以免觸犯罪行，即可以此作爲免責辯護。如該人是按僱主所給予的指示行事，並已採取所有合理步驟以確保不會觸犯罪行，也可以此作爲免責辯護。

3. 在本港的法例中，提供類似上述免責辯護條款的例子有《水污染管制條例》（第 358 章）第 12(1)(f)和 12(1A)(b)條，以及《應課稅品條例》（第 109 章）第 46A(1)條。英國法例中也有類似的免責辯護條款，例如 1974 年 the Dumping At Sea 法案 1975 年(Overseas Territories)命令、1995 年 Plant Protection Products 規例，以及 1985 年 Food And Environment Protection 法案。有關條文的摘錄載於**附件 A**（請參閱英文版附件）。

附件 A

4. 我們建議以現有法例中的有關條文爲藍本，在條例草案中爲僱主和僱員訂定類似的免責辯護條款。基本上，如僱主被檢控，他/她如果能證明他／她已採取所有切實可行的步驟以防止該罪行發生，即可以此作爲免責辯護。如僱員被檢控，他/她如果能證明他／她是按照僱主的指示行事，而他／她又沒有合理理由相信有關的解碼器屬未經批准的解碼器，即可以此作爲免責辯護。我們認爲有關僱主和僱員的免責辯護條款是合理、恰當和能平衡各方利益的。

馬逢國議員提議的委員會審議階段修正案（會議紀要第 5(b)段）

5. 該草擬委員會審議階段修正案的目的，是要將任何人在沒有合法授權或合理辯解的情況下，管有或使用未經批准的解碼器，以收看任何根據牌照提供的電視節目服務，意圖逃避繳付適用於收看該服務的收看費，列爲罪行。

6. 該草擬修正案也建議，在有關罪行的法律程序中，被控人如證明他既不知道亦無合理理由相信有關的解碼器屬未經批准的解碼器，即可以此作爲免責辯護。至於擬議的罰則，凡任何人觸犯有關罪行，一經循簡易程序定罪，可處第二級罰款（即5,000元）。

建議修正案會否對公帑造成負擔

附件 B

7. 根據立法會議事規則第57(6)條（有關摘要見**附件B**（請參閱英文版附件）），立法會主席或全體委員會主席如認爲任何法案的目的或效力可導致動用香港任何部分政府收入或其他公帑，或須由該等收入或公帑負擔，則該修正案只可由以下人士提出：行政長官、獲委派官員（根據議事規則第9條），或獲行政長官書面同意提出該提案的任何議員。這就是有關"對公帑造成負擔"的規則。

8. 雖然該草擬修正案所訂立的刑事罪行，可能會引致行政費用增加，但由於不會涉及全新和性質不同的開支，因此，就議事規則第57(6)條而言，建議的修正案不會對公帑造成負擔。

政府當局的立場

9. 我們已在"政府當局就委員會主席在二零零三年十一月二十六日會議上提出的要求所作的回應"（立法會文件第CB(1)650/03-04(01)號）一文中說明，本港現時在未經許可下接收收費電視服務的問題，主要是由於香港有線電視有限公司（有線電視）以模擬形式傳送服務，以致服務容易在未經許可下亦可接收。我們的政策路向，是主要針對售賣未經批准解碼器或使用該等解碼器作商業用途的人，及鼓勵營 辦商採取適當的防護措施去控制該問題。這與很多先進經濟體系的有關做法一致。

10. 我們認爲，只有在實行其他較不擾民而又爲社會較能接受的措施（如數碼化）後，未經批准接收收費電視的問題仍然猖獗，當局才有充分理據提出最終選擇，立法把家庭觀眾／個人在未經許可下接收收費電視的行爲刑事化。

執法問題

11. 要執行擬議的條文，將會既困難又擾民，因爲執法人員須要在有合理理由相信有人正在或已經在某住宅內觸犯法例，並持有所需手令的情況下，進入住宅執法。這或可解釋爲何在已就未經許可而接收收費電視服務的行爲施加刑事制裁的地方，例如美國、英國和加拿大，執法行動也是以打擊售賣非法器材的人爲主，而不是針對最終使用者。

12. 在加拿大，最嚴重的問題是，有人使用非法設備以接收未經加拿大當局認可的分銷商所提供的直達用戶家庭衞星電視服務。凡任何人使用該等設備，即屬違法。加拿大國會下議院的加拿大傳統常設委員會（Standing Committee on Canadian Heritage）（常設委員會）曾討論針對最終使用者的執法工作所遇到的困難。雖然上述罪行與馬逢國議員所建議的並非完全一樣，但常設委員會曾進行的討論，或可說明就針對家庭觀眾／個人最終使用者的擬議罪行進行執法工作所遇到的困難。以下爲業界和執法機關（皇家加拿大騎警）的意見：

> Bell Express Vu（領有牌照的衞星電視服務營辦商）主席兼行政總裁 **David McLennan 先生**：
>
> 「有關我們應如何致力打擊黑市和灰色地帶市場的問題，我們應從該類產品的銷售層面的執法工作入手。我們須加強打擊宣傳和出售該類產品的衞星器材販賣商和零售商。我們應從這方面入手。」
>
> 加拿大有線電視協會（Canadian Cable Television Association）主席兼行政總裁 **Janet Yale 女士**認同上述意見：
>
> 「.....這是一場難以取勝的公關戰，也是我們爲何認爲起訴購買碟型天線的人不能解決問題的原因之一。.....因此我們解決問題的辦法不是要懲罰購買該等接收卡的消費者，而是針對出售接收卡的販賣商。」

皇家加拿大騎警：

「.....皇家加拿大騎警繼續調查灰色地帶市場，並會針對以商業模式非法經營的個人或公司。」

13. 以上的陳述載於常設委員會於二零零三年六月發表名爲 *Our Cultural Sovereignty – The Second Century of Canadian Broadcasting* 的報告（第 16 章）。有關摘錄見**附件 C**（請參閱英文版）。整份報告可於加拿大國會的網站（www.parl.gc.ca）下載。

附件 C

最新情況

14. 數碼化能有效地令未經批准的模擬解碼器變得毫無用處，而服務營辦商也可定期更改編碼技術，令非法的數碼解碼器不能接收有關服務。截止二零零四年一月底，有線電視的數碼化計劃約 80%已告完成（在 650 000 個有線電視用戶中，530 000 個正接收數碼服務）。我們認爲，數碼化迄今能有效地遏止未經批准接收收費電視的問題。

結語

15. 政府不會容忍盜看收費電視的行爲。雖然政府當局會制訂適當的法律架構以打擊盜看的情況，但業界也須承擔主要責任，採取適當的防禦措施，以防止盜看。我們認爲，數碼化並不是解決盜看問題的萬全之策，但電視數碼化後，盜看會十分困難，成本亦很高。再者，我們沒有排除把家庭觀眾／個人盜看收費電視的行爲刑事化的可能性。不過，我們仍然認爲，只有在有線電視完成其數碼化計劃後，如果盜看的情況仍然猖獗，才應引入上述刑事法律責任。政府當局強烈反對有關的修正案。

工商及科技局
通訊及科技科
二零零四年三月

Section of Enactment

Chapter:	358	Title:	WATER POLLUTION CONTROL ORDINANCE	Gazette Number:	
Section:	**12**	Heading:	**Defences**	Version Date:	30/06/1997

(1) A person does not commit an offence under section 8(1), 8(2), 9(1) or 9(2) if he proves that-

(a) the discharge or deposit in question is an existing discharge or deposit-
(i) in respect of which an application under section 14 has been made and the prescribed application fee paid when required and the applicant has not been notified of a refusal to grant a licence as required by section 15(2); or
(ii) which is made under, and in accordance with, a licence granted under section 15, 16 or 23A; or (Replaced 67 of 1990 s. 8. Amended 83 of 1993 s. 8)
(b) the discharge or deposit in question is made under, and in accordance with, a licence granted under section 20; or
(c) where section 2(3) applies, the matter was deposited pursuant to an approval under subsection (2) and in accordance with the terms and conditions thereof; or
(d) (Repealed 67 of 1990 s. 8)
(e) the discharge or deposit was made in an emergency in order to avoid danger to life or property and as soon as was reasonably practicable he informed the Authority thereof in writing; or
(f) he acted under instructions given to him by his employer and he exercised the care and took the steps that the court, having regard to his position as an employee, considers reasonable in the circumstances to avoid the occurrence of the prohibited discharge or deposit. (Replaced 67 of 1990 s. 8)

(1A) A person does not commit an offence under section 8(1A) if he proves that-

(a) the discharge or deposit was made in an emergency in order to avoid danger to life or property and as soon as was reasonably practicable he informed the Authority thereof in writing; or
(b) he acted under instructions given to him by his employer and he exercised the care and took the steps that the court, having regard to his position as an employee, considers reasonable in the circumstances to avoid the occurrence of the prohibited discharge or deposit. (Added 67 of 1990 s. 8)

(1B) A person does not commit an offence under section 8 or 9 in respect of a discharge-

(a) that is licensed under the Waste Disposal Ordinance (Cap 354); or
(b) that complies with the Waste Disposal (Livestock Waste) Regulations (Cap

354 sub. leg.). (Added 67 of 1990 s. 8)

(2) The Authority may by order published in the Gazette approve the making of any particular kind of deposit as a farming practice to which the provisions of subsections (1)(a), (1)(b) and (1A) of section 8, or either of those provisions, do not apply so far as it is made in such areas by such persons and in such manner as may be specified in the order. (Amended L.N. 74 of 1986; 67 of 1990 s. 22; 83 of 1993 s. 8)

(3) The power of the Authority under subsection (2) extends to practices employed in all kinds of farming, including agriculture, animal husbandry and fish farming. (Amended L.N. 74 of 1986; 83 of 1993 s. 8)

條文內容

▼

章：	358	標題：	水污染管制條例	憲報編號：	
條：	12	條文標題：	免責辯護	版本日期：	30/06/1997

(1) 任何人如證明下述情事，則不犯第8(1)、8(2)、9(1)或9(2)條所訂的罪行—

(a) 所涉的排放或沉積爲現有的排放或沉積—

(i) 而有人已就該現有的排放或沉積根據第14條提出申請以及應規定繳付訂明的申請費用，且申請人並未獲第15(2)條規定的拒絕批給牌照的通知；或

(ii) 而該現有的排放或沉積是根據並按照根據第15、16或23A條批給的牌照作出的；或 (由1990年第67號第8條代替。由1993年第83號第8條修訂)

(b) 所涉的排放或沉積是根據並按照根據第20條批給的牌照作出的；或

(c) 凡第2(3)條適用，物質的沉積是依據根據第(2)款作出的批准並按照該項批准的條款及條件作出的；或

(d) (由1990年第67號第8條廢除)

(e) 排放或沉積是在緊急情況下爲避免危及生命或財產而作出的，該人並已在合理切實可行範圍內，盡早以書面通知監督；或

(f) 他按僱主所給予的指示行事，並已謹慎行事和已採取步驟，而法庭在顧及他作爲僱員的地位後，認爲在該情況下，爲避免受禁止的排放或沉積發生而如此行事和如此採取步驟是合理的。 (由1990年第67號第8條代替)

(1A) 任何人如證明下述情事，則不犯第8(1A)條所訂的罪行—

(a) 排放或沉積是在緊急情況下爲避免危及生命或財產而作出的，該人並已在合理切實可行範圍內，盡早以書面通知監督；或

(b) 他按僱主所給予的指示行事，並已謹慎行事和已採取步驟，而法庭在顧及他作爲僱員的地位後，認爲在該情況下，爲避免受禁止的排放或沉積發生而如此行事和如此採取步驟是合理的。 (由1990年第67號第8條增補)

(1B) 凡屬以下排放，任何人不會就該排放而犯第8或9條所訂的罪行—

(a) 已根據《廢物處置條例》(第354章)領有牌照者；或
(b) 符合《廢物處置(禽畜廢物)規例》(第354章，附屬法例)的規定者。 (由1990年第67號第8條增補)

(2) 監督可藉在憲報刊登的命令，批准作出任何個別種類的沉積，作爲第8條第(1)(a)、(1)(b)及(1A)款的條文或其中任何條文所不適用的農作方法，但只限於由命令所指明的人，按命令所指明的方式，在命令所指明的地區所作出的沉積。 (由1986年第74號法律公告修訂；由1990年第67號第22條修訂；由1993年第83號第8條修訂)
(3) 監督根據第(2)款具有的權力，延伸至所有農作種類所採用的方法，包括農業、畜牧業及養魚業所採用的方法。 (由1986年第74號法律公告修訂；由1993年第83號第8條修訂)

前一條文　　下一條文　　轉換語言　　返回法例名單

Section of Enactment

Chapter:	109	Title:	DUTIABLE COMMODITIES ORDINANCE	Gazette Number:	
Section:	**46A**	Heading:	**Liability for acts of servants**	Version Date:	30/06/1997

(1) Where an offence against this Ordinance is committed by a servant of a licensee, the licensee shall, without prejudice to the liability of any other person, also be guilty of that offence but shall not be liable to any term of imprisonment.
(2) Where a prosecution is brought against a licensee by virtue of this section in respect of an offence committed by a servant, it shall be a defence -

(a) in the case of an offence against section 61, 71, 72 or 73, if the licensee shows that he exercised such control over the servant as would ensure that the servant was not likely to act in contravention of that section; or (Amended 40 of 1974 s. 8; 34 of 1976 s. 6)
(b) in the case of any other offence, if the licensee shows that he took all practicable steps to prevent the commission of the offence.

(3) Where a licence is granted to any person wholly or partly for the benefit of a company reference to "licensee" in this section shall be read as including references to the company.
(Added 3 of 1970 s. 20)

條文內容

章： 109 標題： 應課稅品條例 憲報編號：
條： **46A** 條文標題： 對受僱人的作為負上的法律責任 版本日期： 30/06/1997

(1) 凡持牌人的受僱人犯本條例所訂罪行，在不損害任何其他人的法律責任的原則下，該持牌人亦屬犯該罪行，但不得處以監禁。
(2) 凡就某受僱人所犯罪行而憑藉本條對持牌人提起檢控，持牌人如提出以下證明，即可以此作爲免責辯護—

(a) (如屬第61、71、72或73條所訂的罪行)持牌人證明已對該受僱人有所管制，以確保該受僱人相當可能不會違反該條行事；或 (由1974年第40號第8條修訂；由1976年第34號第6條修訂)
(b) (如屬任何其他罪行)持牌人證明已採取所有切實可行的步驟，以防止該罪行發生。

(3) 如牌照是完全或部分爲某公司的利益而批予任何人的，則本條中凡提述“持牌人”之處，須理解爲包括提述該公司。

(由1970年第3號第20條增補)

1975 No 1831

DUMPING AT SEA ACT 1974 (OVERSEAS TERRITORIES) ORDER 1975
1975 No 1831

SCHEDULE 1
Articles 3 and 4

Made 12 November 1975
Laid before Parliament 19 November 1975
Coming into Operation 10 December 1975

Dumping at Sea Act 1974 (Overseas Territories) Order 1975, 1975 No 1831, Sch. 1

SCHEDULE 1 Provisions of the Dumping at Sea Act 1974 as extended to the Territories specified in Schedule 2 hereto and to the Solomon Islands

1 Restrictions on dumping in the sea

(1) Subject to the provisions of this section, no person, except in pursuance of a licence granted under section 2 below and in accordance with the terms of that licence--

(a) shall dump substances or articles in the territorial waters of the Territory; or

(b) shall dump substances or articles in the sea outside the territorial waters of the Territory from a British ship, aircraft, hovercraft or marine structure; or

(c) shall load substances or articles on to a ship, aircraft, hovercraft or marine structure in the Territory or its territorial waters for dumping in the sea, whether in such waters or not; or

(d) shall cause or permit substances or articles to be dumped or loaded as mentioned in paragraphs (a) to (c) above.

(2) Subject to subsections (3) to (5) below, substances and articles are dumped in the sea for the purposes of this Act if they are permanently deposited in the sea from a vehicle, ship, aircraft, hovercraft or marine structure, or from a structure on land constructed or adapted wholly or mainly for the purpose of depositing solids in the sea.

(3) A discharge incidental to or derived from the normal operation of a ship, aircraft, vehicle, hovercraft or marine structure or of its equipment does not constitute dumping for the purposes of this Act unless the ship, aircraft, vehicle, hovercraft or marine structure in question is constructed or adapted wholly or mainly for the purpose of the disposal of waste or spoil and the discharge takes place as part of its operation for that purpose.

(4) A deposit made by, or with the written consent of, a harbour authority or lighthouse authority, for the purpose of providing moorings or securing aids to navigation, does not constitute dumping for the purposes of this Act.

(5) A deposit made by or on behalf of a harbour authority in the execution of works of

maintenance in their harbour does not constitute dumping for the purposes of this Act if it is made on the site of the works.

(6) Subject to subsections (7) to (9) below, any person who contravenes subsection (1) above shall be guilty of an offence and liable--

(a) on summary conviction to a fine of not more than ?00 or to imprisonment for a term of not more than six months or to both; or

(b) on conviction on indictment, to imprisonment for not more than five years, or a fine, or to both.

(7) It shall be a defence for a person charged with an offence under subsection (6) above to prove--

(a) that the substances or articles in question were dumped for the purpose of securing the safety of a ship, aircraft, hovercraft or marine structure or of saving life; and

(b) that he took steps within a reasonable time to inform the Governor that the dumping had taken place and of the locality and circumstances in which it took place and the nature and quantity of the substances or articles dumped,

unless the court is satisfied that the dumping was not necessary for any of the purposes mentioned above and was not a reasonable step to take in the circumstances.

(8) It shall be a defence for a person charged with an offence under subsection (6) above to prove--

(a) that he acted under **instructions given to him by his employer,** or

(b) that he acted in reliance on information given to him by others without any reason to suppose that the information was false or misleading,

and in either case that he took all such steps as were reasonably open to him to ensure that no offence would be committed.

(9) It shall be a defence for a person charged with an offence under subsection (6) above in relation to substances or articles dumped outside the territorial waters of the Territory from a British ship, aircraft or hovercraft to prove that they were loaded on to it in a Convention State and that the dumping was authorised by a licence issued by the responsible authority in that State.

2 Licences

(1) In determining whether to grant a licence the Governor shall have regard to the need to protect the marine environment and the living resources which it supports from any adverse consequences of dumping the substances or articles to which the licence, if granted, will relate; and the Governor shall include in a licence such conditions as appear to him to be necessary or expedient for the protection of that environment and those resources from any such consequences.

(2) The Governor may revoke a licence if it appears to him that the holder is in breach of a condition included in it.

(3) The Governor may vary or revoke a licence if it appears to him that the licence ought to be varied or revoked because of a change of circumstances relating to the marine environment or the living resources which it supports, including a change in scientific knowledge.

(4) The Governor may require an applicant for a licence to pay such fee on applying for it

1995 No 887

*** THIS DOCUMENT IS CURRENT THROUGH 8 DECEMBER, 2003 ***

PLANT PROTECTION PRODUCTS REGULATIONS 1995
1995 No 887

Made - - - 22 March 1995

Plant Protection Products Regulations 1995, SI 887, s. 23

23 General defence of due diligence

(1) In any proceedings for an offence under these Regulations it shall be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.(2) Without prejudice to the generality of paragraph (1) above, a person is to be taken to have established the defence provided by that paragraph if he proves--

(a) that he acted under **instructions given to him by his employer;** or(b) that he acted in reliance on information supplied by another person without any reason to suppose that the information was false or misleading,

and in either case that he took all such steps as were reasonably open to him to ensure that no offence would be committed.

(3) If in any case the defence provided by paragraph (1) above involves an allegation that the commission of the offence was due to an act or omission by another person, other than the giving of instructions to the person chargedwith the offence by his employer, or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless within a period ending seven clear days before the hearing, he has served on the prosecutor a notice giving such information identifying or assisting in the identification of that other person as was then in his possession.

NOTES:

Amendment

Revoked, in relation to Scotland, by SSI 2003/579, reg 29, Sch 5.

Date in force: 31 December 2003: see SSI 2003/579, reg 1(1).

1985 CHAPTER 48

*** THIS DOCUMENT IS CURRENT THROUGH 20 NOVEMBER, 2003 ***

FOOD AND ENVIRONMENT PROTECTION ACT 1985
1985 CHAPTER 48

PART IV GENERAL AND SUPPLEMENTARY

Royal Assent [16 July 1985]

Food and Environment Protection Act 1985, Ch. 48, s. 22 (Eng.)

22 General defence of due diligence

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(a) that he acted under **instructions given to him by his employer;** or

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NOTES:

Initial Commencement

To be appointed

To be appointed: see s 27(1).

Appointment

Appointment: 1 January 1986: see SI 1985/1698, art 2.

Annex B

Extract from the Rules of Procedures of the Legislative Council
節錄自香港特別行政區立法會議事規則

57. Amendments to Bills

(6) An amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by -

(a) the Chief Executive; or

(b) a designated public officer ; or

(c) a Member, if the Chief Executive consents in writing to the proposal.

57. 法案的修正案

(6) 立法會主席或全體委員會主席如認為任何修正案的目的或效力可導致動用香港任何部分政府收入或其他公帑, 或須由該等收入或公帑負擔, 則該修正案只可由以下人士提出 ?? *(1999年第107號法律公告)*

(a) 行政長官；或

(b) 獲委派官員；或

(c) 任何議員, 如行政長官書面同意該提案。

The Current Legal Status of Grey Market Satellite Systems

On 26 April 2002, the Supreme Court of Canada held that grey market satellite reception in Canada is illegal.[38] Specifically, the Court held that section 9 of the *Radiocommunication Act* prohibits the decoding of all encrypted satellite signals, with a limited exception. It based this decision on principles of statutory interpretation and an examination of the language used by Parliament in creating the provision, together with a view to the overall objectives and regulatory regime for broadcasting in Canada.

The Court held that the *Radiocommunication Act* forbids the activity of decoding an encrypted subscription signal, and thus the prohibition "is directed towards the reception side of the broadcasting equation."[39] This prohibition captures the decoding of any encrypted signal, subject to the exception that the person receiving the signal has received authorization from the lawful distributor. Here the Court is quite clear in stating that "if no lawful distributor exists to grant such authorization, the general prohibition must remain in effect."[40] The only parties with the lawful right to distribute the signals in Canada — and thus grant authorization — are those licenced by the CRTC to do so: Bell ExpressVu or Star Choice. Therefore, reception of satellite signals emanating from U.S. broadcasters to Canadian residents through grey market systems is against the law in Canada.

In further support of this view that section 9(1)(c) of the Act creates an absolute prohibition against decoding, followed by a limited exception, the Supreme Court looked to the broader context of the overall regulatory regimes of telecommunications and broadcasting in Canada. It stated that the *Radiocommunication Act* and the *Broadcasting Act* operate in tandem as part of a single regulatory scheme. The *Broadcasting Act*, the Court said, evinces a clear cultural orientation. As such, the wording of the *Radiocommunication Act*, when read in the context of the objectives of *Broadcasting Act*, furthers broadcasting policy objectives by encouraging broadcasters to comply with the regulatory process before they could grant authorization to have their signals decoded and collect subscription fees: why, asked the court, "would Parliament provide for Canadian ownership, Canadian production, Canadian content in its broadcasting and then simply leave the door open for unregulated, foreign broadcasting to come in and sweep it aside? What purpose would have been served?"[41]

Lastly, this particular interpretation provides protection to the holders of copyright and complements the scheme of the *Copyright Act*. An absolute

prohibition against decoding except where authorization is granted by the person with the lawful right to transmit and authorize decoding of the signal extends protection to the holders of copyright in the program itself, since it would prohibit the unauthorized reception of signals that violate copyright.

Implications

One of the major concerns as a result of this decision was a fear that the several hundred thousand Canadians who own grey market satellite systems would be vulnerable to criminal charges because they were in breach of the *Radiocommunication Act*. It is worth remembering that these systems were legitimately purchased and all U.S. subscription fees paid in full. Given that the Act provides for criminal sanctions of imprisonment and onerous fines for every person found to be in violation of the statute, many were afraid that they could expect a knock on their door and a visit from the police and that their satellite equipment would be confiscated. Indeed, this line of argument was pursued by counsel on behalf of grey market satellite system vendors at the Supreme Court hearing of this appeal.

The Court, however, was not convinced that that particular scenario would in fact occur. The language used by the Court here is instructive, and it is helpful to set it out and examine it in full.

The Court first stated, "I am not, however, persuaded that this plays an important role in the interpretive process here."[42] In other words, the Court felt that this is an issue tangential to the legal substance of this appeal, which focused narrowly on how to properly interpret the wording of section 9(1)(c). The Court then went on to say:

> In any event, I do not think it correct to insinuate that the decision in this appeal will have the effect of automatically branding every Canadian resident who subscribes to and pays for U.S. DTH broadcasting services as a criminal. The penal offence in s. 10(1)(b) requires that circumstances "give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9" (emphasis in original), and allows for a "lawful excuse" defence. Section 10(2.5) further provides that "[n]o person shall be convicted of an offence under paragraph 9(1)(c) ... if the person exercised all due diligence to prevent the commission of the offence".[43]

Put another way, prior to this decision, the legality of ownership and use of grey market satellite systems was in question — which is why the issue made it to the Supreme Court of Canada — and you cannot criminalize activity that is not clearly criminal. As there were some legitimate reservations as to whether this activity was in breach of the law, it would be impossible to say that those who acted prior to the date of this decision (26 April 2002) were obtaining or using the systems for the purpose of contravening section 9 of the *Radiocommunication Act*. If you did not know the equipment was clearly illegal, there would be no intent to use the equipment for the purpose of violating the Act. This line of argument fails as of the date of the ruling, as the law on this is now clear.

Finally on this issue, the Court concluded by stating that "[s]ince it is neither necessary nor appropriate to pursue the meaning of these provisions absent the proper factual context, I refrain from doing so."[44] This means that as this appeal focused very narrowly on a statutory interpretation issue, the criminal law liability and sanctions aspects of the legislation will be left to another time when the facts and context of the case raise them directly.

A further aspect of this criminalization issue is whom can be captured by it: grey market system vendors or owners? According to the wording of the *Radiocommunication Act*, both. Sections 10(1)(*b*) and 10(2.1) create summary conviction offences for every person providing equipment for the purposes of contravening s. 9 [vendors] **and** for every person who in fact contravenes s. 9(1)(*c*) [owners/users of decoding devices] [emphasis added]. Again, though, given the cautionary language of the Court with respect to the effects of this decision, it would appear unlikely that action would be taken against owners.

However, vendors may be another matter. Canadian satellite signal distributors and others have consistently maintained that they seek action against the vendors rather than the end users. For example, Mr. David McLennan, President and Chief Executive Officer of Bell ExpressVu, told the Committee that:

> With respect to where we should be focusing our efforts on the black market and grey market, that starts with enforcing it at the level at which this product is being sold. We need to up the temperature on satellite dealers and retailers who are advertising and selling this product. That's where it starts. If I can go back to the ... Supreme

> Court decision, I think that's just an important catalyst to being able to turn the temperature up on the law enforcement side.[45]

Ms. Janet Yale, President and Chief Executive Officer, Canadian Cable Television Association, echoed this view:

> You're absolutely right; this is a very difficult public relations battle to win, and one of the reasons why we don't say that the solution is to charge individuals who have bought the dishes. If there is advertising in the newspaper that says to come and buy this dish, and buy these cards, people naturally assume that if it weren't appropriate to buy them, they wouldn't be available for sale. So our answer is not to punish the consumers who are buying these cards but to go after the dealers who are selling them.
>
> Second, we try to educate the public on the fact that this is theft, pure and simple — theft. It's no different from stealing something out of a store, because the people who have created this product are not being compensated. So we almost have to create victims of this crime and point out to people that there are real victims, Canadian artists and creators, which means jobs in Canada, if not yesterday then certainly tomorrow.[46]

A *Globe and Mail* newspaper article the morning after the decision stated that:

> The broadcasting industry, government and RCMP alike say they'll be targeting commercial vendors of decoders rather than individual owners of satellite dishes or subscribers to U.S. satellite services. 'Our primary focus is the dealers. It's not our intention to root around trying to find subscriber lists', said Ian Gavanagh, vice-president of Bell ExpressVu.[47]

This position was repeated by RCMP media relations officer Corporal Benoit Desjardins. He stated that "the RCMP continue to investigate the grey market with a focus on persons or companies operating illegally on a commercial scale."[48] This focus on dealer activity rather than individual satellite dish owners has been consistently followed by law enforcement and Canadian satellite industry officials in the months after the Supreme Court of Canada decision.[49]